

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of Laser Northeast Gathering	:	
Company, LLC for Approval to Begin to Offer,	:	
Render, Furnish, or Supply Natural Gas	:	A-2010-2153371
Gathering and Transporting or Conveying	:	
Service by Pipeline to the Public in Certain	:	
Townships of Susquehanna County,	:	
Pennsylvania	:	

**RECOMMENDED DECISION**

Before  
Susan D. Colwell  
Administrative Law Judge

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## I. INTRODUCTION

From its inception, this case has spurred controversy and has stirred a strong emotional response in the rural regions affected by the current natural gas boom, in the industry seeking to extract the gas, and in the press. The Commission recognized the potential for safety problems and convened its own investigation through *en banc* hearings and comments filed by interested entities. Legislators requested public input hearings, and two were held. Public input hearings are not normally held in conjunction with an application case because the standard used to evaluate applications for a certificate of public convenience (CPC) is well-established and will not waiver according to the weight of public opinion. However, the participants in the public input hearings were prepared and provided solid legal support as well as numerous factual examples of gas industry behavior to place the case in its proper perspective. The people of Susquehanna County understood that the handling of this case would set a precedent for the numerous other companies seeking to establish their territories in the Marcellus Shale region of Pennsylvania and stepped up to the microphone with serious, intelligent, and well-thought-out observations, analyses and recommendations. This decision includes a summary of the public input testimony and quotes a number of the witnesses from those two hearings in the Discussion section.

The citizens of Susquehanna County who spoke showed a keen understanding that drilling and related activities were to be a fact of life for them. They were hopeful that the development would be handled in a safe and environmentally friendly way, with the recognition that the landowners, some of whom have been located there for generations, should have the final say regarding where and whether their land is suited to drilling and pipelines, and with what restrictions. They know that this case may be precedential for future treatment of gathering companies and ask that the Commission take care to get it right the first time.

The parties, after an initial period of unusually vitriolic behavior, settled down and produced a slate of very well-written briefs. The ultimate issue is whether the service offered by Applicant is public utility service, and if so, whether there is a “light-handed” approach available to regulating it. For reasons explained in detail below, I find that the

Application should be denied as the service offered is not offered “to or for the public,” as the Public Utility Code requires, but is simply the commercial process used to carry natural gas from the producers to market. While the imposition of safety regulations for the way in which the gathering lines are constructed would be a good idea, the action must be based in a legislative mandate which does not presently exist.

## II. HISTORY OF THE PROCEEDING

On January 19, 2010, Laser Marcellus Gathering Company LLC (Applicant) filed an Application for a certificate of public convenience to begin to offer gathering and transporting or conveying service by pipeline to the public in the Townships of Apolacon, Choconut, Forest Lake, Great Bend, Jessup, Liberty, Middletown and New Milford in Susquehanna County, Pennsylvania. Notice of the Application was published in the *Pennsylvania Bulletin* on January 30, 2010, at 50 Pa.B.687. Applicant submitted proof on February 19, 2010, that the *Susquehanna County Independent* published notice of the Application on January 27, 2010.

The following protests were filed: on February 19, 2010, Laurie and Brian Kaszuba; on February 20, 2010, Vera Scroggins; on February 26, 2010, Rebecca Roter; on March 1, 2010, ETC Northeast Pipeline LLC (ETC); on March 5, 2010, Rita Chirumbolo Ernstrom; on March 8, 2010, Silver Lake Association.

The following petitions to intervene were filed: on March 1, 2010, ETC NE Pipeline (ETC); and Independent Oil and Gas Association of Pennsylvania (IOGA<sup>1</sup>); on March 5, 2010, Laurel Mountain Midstream LLC (LMM); on April 2, 2010, MarkWest Liberty Midstream & Resources, LLC (MarkWest); on April 12, 2010, DTE Pipeline Company and Bluestone Pipeline Company of PA (DTE).

On April 1, 2010, the Office of Consumer Advocate (OCA) filed its notice of intervention.

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<sup>1</sup> By letter, IOGA reported that, effective April 1, 2010, it has changed its name to the *Pennsylvania Independent Oil and Gas Association*, thereby becoming “PIOGA,” as it will be referred to after this point.

On March 18, 2010, Applicant filed Preliminary Objections to the protest of Laurie and Brian Kaszuba. On March 30, 2010, the Kaszuba Protest was withdrawn.

On March 19, 2010, Applicant filed Answers to the petitions to intervene of IOGA and Laurel Mountain. On March 23, 2010, Applicant filed a letter confirming that they had requested and received a 7-day extension for filing responsive pleadings.

On March 23, 2010, Applicant filed its Answer to ETC's petition to intervene.

On March 26, 2010, Applicant filed individual Preliminary Objections to the protests of the Silver Lake Association, Vera Scroggins, Rita Chirumbolo Ernstrom, and Rebecca Roter. On April 12, 2010, Rita Chirumbolo Ernstrom withdrew her protest, thus rendering the Preliminary Objections against her protest moot.

On March 30, 2010, notice of the prehearing conference was issued, setting the prehearing conference for April 28, 2010, in Harrisburg.

On April 2, 2010, MarkWest filed a Motion for publication of an amended notice in the *Pennsylvania Bulletin*.

On April 2, 2010, William C. Fisher filed a response to the preliminary objections to the Silver Lake protest, and Vera Scroggins filed a response to the preliminary objections against her protest.

Also on April 2, 2010, Applicant filed an amendment to its Application, and a letter from ETC stated that the amendment resolved its protest.

On April 21, 2010, an order denying the preliminary objections against Silver Lake Association, Vera Scroggins and Rebecca Roter was issued. On April 26, 2010, Applicant filed revised preliminary objections against Rebecca Roter.

On April 26, 2010, Michael D. Fiorentino, Esq., filed his entry of appearance on behalf of the Silver Lake Association, and the Office of Trial Staff filed a notice of intervention.<sup>2</sup>

Prehearing memos were filed by Applicant, ETC Northeast, PIOGA, Mr. Fischer, OTS, OCA, DTE, MarkWest, and LMM.

The prehearing conference was held as scheduled. At the hearing, Superior Appalachian Pipeline, LLC, presented a petition to intervene. The following attorneys attended the prehearing conference: Daniel P. Delaney, Esq., for Applicant; Thomas J. Sniscak, Esq., for ETC Northeast; Kevin J. Moody, Esq., for PIOGA; Brian J. Clark, Esq., for Laurel Mountain Midstream; James A. Mullins, Esq., for OCA; Adeolu Bakare, Esq., for OTS; Brian J. Knipe, Esq., for MarkWest Liberty Midstream; John H. Isom, Esq., for DTE Pipeline and Bluestone Pipeline; Michael D. Fiorentino, Esq., for Silver Lake Association; Elizabeth U. Witmer, Esq., for Superior Appalachian Pipeline, Inc.; and protestants William C. Fischer and Vera Scroggins appeared pro se.

Petitions to intervene that were filed by ETC, LMM, MarkWest, and Superior Appalachian Pipeline, were not opposed by Applicant.

To Petitions to intervene filed by PIOGA and DTE, Applicant specified that these were not opposed inasmuch as they were limiting their interventions to the subject matter stated in their petitions.

All six petitions for intervention were granted as unopposed.

At the prehearing conference, Superior Appalachian Pipeline, Inc., presented its petition to intervene, and Applicant was afforded additional time to respond.

The scheduling order was issued on April 29, 2010.

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<sup>2</sup> OTS also filed a petition with the Commission for permission to participate in this matter. In anticipation of the Commission's positive response to the petition, OTS will be afforded full party status.

On May 5, 2010, Silver Lake Association filed a Motion to Require Reissuance of Public Notice of Application, alleging that the published notice was inadequate because it failed to identify with requisite specificity the location of the areas impacted by the Application and as such, was not reasonably calculated to inform members of the public whether the application would affect them.

On May 11, 2010, Applicant filed a notice that it had changed its name to Laser Northeast Gathering Company, LLC and requested that the caption be changed to reflect this change.

On May 12, 2010, Applicant served its direct testimony and filed a letter noting this service.

On May 24, 2010, Applicant filed its Answer and Memorandum of Law in Support of its Answer to the motion to republish. On May 28, 2010, an order was issued which granted the request for change in the caption, denied the revised preliminary objections, and denied the motion for reissuance of notice.

On June 15, 2010, a conference call was held pursuant to the Applicant's announcement that it had been acquired by Delphi Midstream Partners, LLC, in a securities purchase transaction signed June 11, 2010. Applicant sought a revised litigation schedule to permit supplemental direct testimony to address the issue. The proposed revisions would move the evidentiary hearings to August and briefing to September. Protestants sought the filing of an amended application and republication to begin the application process from the beginning.

Pursuant to the requests of Representatives Sandra J. Major, 111<sup>th</sup> Legislative District, Tina Pickett, 110<sup>th</sup> Legislative District, Matthew E. Baker, 68<sup>th</sup> Legislative District and Karen Boback, 117<sup>th</sup> Legislative District, letters dated May 13 and 14, 2010, two public input hearings were scheduled and held in Susquehanna County on July 7, 2010, in or near the townships named in the Application.

A conference call was held June 24, 2010, regarding the proposed amended schedule, and ultimately, the schedule was amended by Order issued July 5, 2010:

Parties other than applicant's supplemental direct	July 21, 2010
Applicant's rebuttal	July 26, 2010
Parties other than applicant's rebuttal	August 13, 2010
Hearings	August 23, 24 & 25, 2010
Main Brief	September 27, 2010
Reply Brief	October 11, 2010

On July 12, 2010, Scott J. Rubin, Esq., entered his appearance on behalf of Protestant Vera Scroggins, who had been unrepresented. He also filed a Motion to File Direct Testimony and Motion for Admission *Pro Hac Vice* for Deborah Goldberg and Megan Klein. The Motion for Admission *Pro Hac Vice* was unopposed and granted by Order issued July 23, 2010 (Seventh Prehearing Order).

On July 15, 2010, Applicant filed an Answer in Opposition to the Motion to File Direct Testimony. On July 16, 2010, Protestant filed an Answer to New Matter, stating that the Applicant's Answer raised new matter but failed to identify it as such as required by 52 Pa.Code § 5.62(b). Protestant Fischer filed a Memorandum in Support of Motion by Vera Scroggins to File Direct Testimony on July 16, 2010.

The Sixth Prehearing Order which granted the Motion to File Direct Testimony was issued on July 19, 2010, both by hard copy and by e-mail. On July 20, 2010, Applicant filed a Petition for Reconsideration. By e-mail, the parties were told to respond on or before noon on Friday, July 23, 2010. Protestant Scroggins filed an Answer on July 22, 2010.

Applicant indicated that it would be satisfied with an order permitting it to respond to Protestant Scroggins' direct testimony on August 6, 2010, instead of July 26, 2010. This agreement was extended in the Scroggins Motion to File Direct Testimony and repeated in her response to Applicant's Petition for Reconsideration and was granted by Order issued July 23, 2010 (Seventh Prehearing Order).

On August 5, 2010, Protestant Scroggins filed a Motion to Strike Legal Statements in Written Testimony and for an Expedited Response. By e-mail, the parties were instructed to respond by noon on August 10, 2010, to permit issuance of an order in time for parties to ascertain whether they must respond to the challenged statements in rebuttal testimony due on August 13, 2010.

Timely responses were filed by the Applicant and LMM/MarkWest (joint answer filed).

The Motion to Strike Legal Statements in Written Testimony was disposed of by Order dated August 11, 2010 (Eighth Prehearing Order).

On August 13, 2010, surrebuttal testimony was served.

The evidentiary hearings were held as scheduled on August 23 and 24, 2010, and the following were admitted into the record:

Laser Northeast Gathering Company LLC

LNG Stmt. 1 Direct of I.J. Berthelot, II, with four exhibits

LNG Stmt. 1A (Suppl) Direct of Thomas F. Karam with four exhibits

LNG Stmt. 2R Jt. Rebuttal of Berthelot and Karam with one exhibit

LNG Stmt. 3R Rebuttal of Harry Dowling

LNG Stmt. 4R Rebuttal of Vincent Bonaddio

LNG Stmt. 5R Jt. Rebuttal of Berthelot and Karam

LNG Cross Exhibits 1 & 2

OTS Stmt. 1 Direct of Michael Gruber plus exhibits

OTS Stmt. 1-SR Surrebuttal of Michael Gruber plus exhibits

Silver Lake Stmt. 1 Direct of Anthony R. Ingraffea plus exhibits (public and proprietary versions)

Silver Lake Stmt. 1a Suppl. Direct of Anthony R. Ingraffea (public and proprietary versions)  
Silver Lake Stmt. 2-R Rebuttal of Anthony R. Ingraffea (public and proprietary versions)

Fischer Stmt. 1 Direct of protestant William C. Fischer  
Fischer Stmt. 1 Suppl. Supplemental Direct of William C. Fischer  
Fischer Stmt. 1 Supp. A Additional supplemental direct of William C. Fischer

Scroggins Stmt. 1 Direct of protestant Vera Scroggins

MarkWest Stmt. 1 Direct of Lindsay N. Sander

LMM Stmt. 1 Direct of Rory Miller

The proceeding generated a transcript of 445 pages. The parties filed Briefs and Reply Briefs. The matter is now ready for decision.

### III. FINDINGS OF FACT

1. Laser Marcellus Gathering Company, LLC, was a Delaware Limited Liability Company whose sole member is Laser Midstream Energy, LP, a limited partnership also organized under the laws of Delaware, at the time of the filing of the Application. At that time, Laser Midstream was owned 80% by Energy Spectrum Partners V and 20% by other private investors. Application at 2.

2. The name of the Applicant was changed to Laser Midstream Gathering Company, LLC when Delphi Midstream partners LLC acquired all the ownership interests of Laser Northeast Gathering Company, LLC, in a securities purchase transaction signed June 16, 2010. LNGC Stmt. 1a at 2.

3. OCA is a statutorily created public advocate empowered to represent the interests of consumers before the Public Utility Commission pursuant to Act 161 of the General Assembly, as amended, 71 P.S. §§ 309-1 *et seq.* OCA Complaint and Notice of Intervention.

4. OTS is an office within the Commission charged with representing the public interest in matters involving utility rates.

5. Pennsylvania Oil and Gas Association (PIOGA) is the trade association representing oil and gas interests throughout Pennsylvania, with approximately 700 members which include oil and natural gas producers, licensed natural gas suppliers (NGSs), and marketers, drilling contractors and service companies. PIOGA Petition to Intervene, as amended ¶2.

6. Protestant William Fischer is a forensic consultant residing in Brackney, Susquehanna County. His background includes a Bachelor of Science from the State University of New York, a tour of duty in the U.S. Marine Corp., six years with the New York State Police, and title search and investigations. Fischer Stmt. 1 at 1.

7. Protestant Vera Scroggins is a property owner in Silver Lake Township, Susquehanna County, and resides in Montrose, Susquehanna County. Her concern for the environment spurred her founding a group called Citizens for Clean Water, which is dedicated to providing information about gas development to the communities that have been or will be affected by gas development. Scroggins Stmt. 1 at 3.

8. The Protest of Silver Lake Association was originally filed by Mr. Fischer, who was told that an association needed to be represented by an attorney. Counsel subsequently entered his appearance, and the protests were separated.

9. Intervenor Superior Appalachian Pipeline, LLC, an Oklahoma limited liability company, is a wholly owned subsidiary of Superior Pipeline Company LLC, and is a

midstream company engaged in the gathering, processing and treating of natural gas. Superior Petition to Intervene at 1.

10. Intervenor MarkWest Liberty Midstream & Resources LLC operates a natural gas pipeline gathering system and processing facility in Pennsylvania for the purpose of gathering Marcellus Shale production from the well head. MarkWest Petition to Intervene at 1.

11. Intervenor Laurel Mountain Midstream, LLC, is a joint venture between indirect subsidiaries of The Williams Companies, Inc. and Atlas Pipeline Partners, LP, operating a natural gas pipeline gathering system in Pennsylvania for the purpose of transporting Marcellus Shale production from the well head. LMM Petition to Intervene at 1.

12. Intervenor DTE Pipeline Company is a Michigan corporation that owns interests in and manages natural gas pipelines that serve the Midwest and Northeast regions of the United States and Ontario, Canada. Bluestone Pipeline Company of Pennsylvania, LLC is a wholly-owned subsidiary of DTE, formed as a Pennsylvania limited-liability company for the purpose of constructing and operating a natural gas gathering system in Susquehanna County, Pennsylvania, to transport natural gas produced from Marcellus Shale formations to the Millennium Pipeline in Broome County, New York. DTE MB at 8; DTE Petition to Intervene at 1-2.

13. ETC Northeast Pipeline LLC is a wholly-owned indirect subsidiary of Energy Transfer Partners, LP and is incorporated in Delaware. ETC NE is a gatherer of natural gas from producers in West Virginia. ETC Petition to Intervene at 1.

14. Laser Northeast submitted the testimony of Thomas F. Karam, founder, president and CEO of Delphi Midstream Partners LLC. LNG Stmt. 1a.

15. Laser Northeast is a natural gas midstream company. Its primary purpose is to construct, build, own, and operate natural gas pipelines and related facilities to provide

gathering and transportation service to producers of gas in Pennsylvania and New York. LNG Stmt. 1a at 5.

16. Laser Northeast is proposing to construct a natural gas gathering and transportation pipeline in Susquehanna County, Pennsylvania, in the townships of Great Bend, Liberty, Franklin, Silver Lake and Forest Lake that will extend into Broome County, New York, to a tie-in with an interstate pipeline. LNG Stmt. 1a at 6.

17. Laser Northeast's sole business will be the gathering and transportation of gas to which it will not hold title. Laser Northeast will not engage in the marketing of gas for others. There will be no direct sales from the gathering lines. LNG Stmt. 1a at 6.

18. Laser Northeast will construct, operate, and maintain its gathering and transportation system and facilities in accordance with pipeline safety regulations promulgated by the U.S. Department of Transportation as required by the Commission's regulations, 52 Pa. Code § 59.33. LNG Stmt. 1a at 7.

19. Laser Northeast is considering the construction of a 16" pipeline, a backbone style gathering system that will span 33 miles with several lateral lines ranging in length of approximately 1 to 6 miles each. LNG Stmt. 1a at 7-8.

20. Laser's proposed compressor facility is located in New York. LNG Stmt. 1a 8.

21. Capital for construction and operations will be provided by DMP. LNG Stmt. 1a at 10; Exhibit B(1).

22. A proposed tariff is attached to the Application at Tab C and to LNG Stmt. 1a as Exhibit C. LNG Stmt. 1a at 11.

23. The current estimated construction cost is approximately \$50 to \$55 million. LNG Stmt. 1a at 11.

24. Laser's service will be to gather and transport gas from producers to the appropriate pipeline. LNG Stmt. 1a at 12.

25. DMP's management team has experience in the construction and operation of pipelines. LNG Stmt. 1a at 14.

26. LMM presented the testimony of Rory Miller, Vice President, Onshore Gathering and Processing, for The Williams Companies, Midstream. LMM Stmt. 1.

27. There are four basic components to the natural gas industry: exploration and production, or upstream services; natural gas gathering, treating and processing, or midstream services; natural gas transportation, or downstream services; and local distribution services. LMM Stmt. 1 at 5.

28. Natural gas gathering entails removing gas from the ground, and processing it to remove water, contaminants and heavy hydrocarbons that are inconsistent with interstate pipelines' quality specifications and generally not suitable for consumption by end-users. LMM Stmt. 1 at 7.

29. Williams operates in Colorado, New Mexico, Wyoming, the Gulf of Mexico, Pennsylvania and western Canada, and only in Texas is gathering treated like a public utility, and then with a special status limited to only certain gathering lines where eminent domain was used. LMM Stmt. 1 at 10.

30. Gathering is not a service provided to the general public because the gas produced is raw and not user-ready. LMM Stmt. 1 at 11.

31. Natural gas gathering customers are sophisticated companies involved in the production business, not retail consumers in need of protections. In contrast with public utilities that provide service at tariff rates, the natural gas gathering business depends on flexibility, and that ability to tailor transactions to each customer's specific needs. This includes being able to construct facilities quickly. LMM Stmt. 1 at 11.

32. Natural gas gathering, and midstream operations in general, do not fit the traditional public utility model. Because the business is competitive and the customers are highly sophisticated, market forces control the participants' behavior. LMM Stmt. 1 at 11.

33. LMM supports efforts by the Commission to become a state agent for the purpose of inspecting and enforcing the current federal safety regulatory requirements. LMM Stmt. 1 at 13.

34. Intervenor MarkWest Liberty Midstream & Resources, LLC offered the testimony of Lindsay N. Sander, a consultant who focuses on public, government and regulatory affairs for MarkWest Energy partners. MarkWest Stmt. 1 at 1.

35. MarkWest supports the Commission's efforts to obtain Commission authority to require, audit and enforce the requirements found in 49 C.F.R. § 192 as a certified state agent of U.S. Department of Transportation, Pipeline and Hazardous Materials Safety Administration ("PHMSA"). MarkWest Stmt. 1 at 4-5.

36. Gathering operators that transport natural gas from or near the well-head to a transmission pipeline do not hold themselves out to serve the public, and do not serve retail end-users. They perform services pursuant to private contracts, and are not common carriers. They provide service to those shippers or producers that have negotiated fees and/or terms and entered into a contractual agreement for the services. MarkWest Stmt. 1 at 10.

37. Gatherers do not transport consumer quality gas but simply gather the raw unprocessed gas stream from the production field. The raw gas stream contains other

hydrocarbons, water, sand and other elements that must be removed before being transported in transmission pipelines or consumed by end-users. MarkWest Stmt. 1 at 10.

#### IV. PUBLIC INPUT HEARINGS

##### Summary of Witness Testimony

###### A. Great Bend Hose Company No. 1, Great Bend, PA July 7, 2010

Michael J. Giangrieco, Susquehanna County Commissioner, appeared as a landowner of a farm and acreage in Forest Lake and Silver Lake Township, also has gas wells on both sides of his property. His concerns are two-fold: safety of gathering lines and the right of eminent domain. One of the first and foremost rights as Americans under the Constitution is the right of ownership of real estate. We pay taxes on it, we do what we want with it. It's a strong and important right, and he is offended to think that, as an American, he can have a private company come in and tell him when, where and how they are going to disrupt his land without his having any say about it. The right of eminent domain and condemnation will be used as a "last resort," which gets here much too soon. The landowners are an inconvenience to the gas company and the pipeline companies. He stated that he had been in cases where Laser Midstream told a group of people that it would pay them \$4.00 an acre, and they might as well take it because the company was going to get the right of eminent domain and take their land anyway.

A lot of the land involved has been family farms for generations and has sentimental value. Owners merely want a right to say where the pipeline is going and how, the right to negotiate with the pipeline company. Granting the right of eminent domain means that landowners lose that right. The companies want the right of eminent domain so that they do not have to deal with the landowners. The companies have already threatened landowners, and that's not the way we do business in America.

Every piece of land has environmental issues, forests and wetlands, and no one knows better how those issues should be dealt with than the landowner who has been born and raised on that land and wants to continue to have the right to have the say as to what happens.

Therefore, he asks the Commission to give serious consideration to this issue. He understands that the wells are going in, and that they have to be connected to a pipeline in order for the landowner to get a royalty. He believes that the negotiation process is the most effective way to proceed to install a gathering system. Tr. 68-75.

James Dapsis, self-employed in his plumbing and heating business, completely agrees with the prior speaker. The ability to take people's property is an outrage. He stated that the gas companies have already lied to them in negotiations, and if they get utility status, will be able to come in and take the property, plain and simple. This would be outrageous. This is not the country he was raised in, and he does not want to see eminent domain used this way. Tr. 75-77.

Patrick Walker, proofreader and editor for Penn Foster, is concerned about the spillover effect of the fracking process and the piping process, the effect on property values and on the communities in general. In general, eminent domain involves the claim that the activity it enables is so important a public good that it trumps individual property rights normally sacred in our nation. In a democracy, the question of whether gas drilling by fracking is itself a vital public good should be decided by a duly-informed public, which has been given time to reflect on the matter, not by profit-hungry industry reps or extensively lobbying legislators who have only heard their side of the story. The gas drilling industry holds a huge advantage in information and legislative influence over PA's general public, and a moratorium is called for until the public can be educated. The gas drilling industry lives in virtual contempt of the common good. The Legislature is not disposed to protect people from dangerous industry as shown by their loopholes from the Safe Drinking Water Act, Clean Air Act, Clean Water Act and Super Fund Law. The benefits that the gas drilling industry talks of are based on discredited economic models. If gas drillers claimed to offer ample energy at minimal cost, this is only because governments irresponsibly failed to make the costs reflect the untold harm they do to third parties and local communities. Local property value will plummet and rural PA will be ravaged. She asked if the gas drillers or Mr. Karam would buy their unsellable homes or find them suitable jobs in a region as lovely as the one they callously stole from them. The companies like this needs to clear a high bar of proof for the common good. Mr. Karam said in

the papers that we probably come here to vent but we are not preventing your speaking truth.  
Tr. 78-85.

Nancy R. Wottrich, environmental consultant, agrees with the first speakers. She is concerned that this application will set a dangerous precedent and could lead to more carelessness and a blatant abuse of power in the way the gas companies are permitted to operate in our state. She is a resident of Susquehanna County and fearful that the sanctity of her home and the way she has chosen to live her life could be in jeopardy. She has come to the sad realization that the Marcellus Shale holds too lucrative a profit for the gas industry to leave the beautiful Endless Mountains anytime soon. She knows the potential economic benefits for the communities are further feeding the frenzy but at the cost of the crumbling infrastructure and degraded environment and human health and safety. She understands the industry's needs for the means to transport the commodity to market. But approval of this application would grant a private industry the rights of a public utility, without the regulatory and safety oversights, including the power to take land by eminent domain. She strongly opposes this because this company requires over ten miles of lines to connect their gathering lines, and those will most likely be acquired by condemnation. The industry should not be permitted to take land for their own financial gain against the property owners will. Eminent domain must be in the public interest to provide a benefit to the public at large.

The gas being extracted is not benefiting Susquehanna County. It is being shipped away from here and being traded on the open markets as a commodity for the immense profits of a few. The power of eminent domain should not be a convenient means to an end, and the power to take land by condemnation makes it too easy, cheap and convenient for the gas company to circumvent negotiations with property owners. If the gas industry desires to reap a resource that by Pennsylvania law we own, then they should be required to discuss and negotiate the terms of the lease with the property owner. Further, if a property owner does not want to lease land, then the gas industry needs to find an alternative location. Eminent domain would leave all property owners at the mercy of the companies. The gas industry is being permitted to operate in Pennsylvania with an alarming lack of regulatory oversight and accountability and has shown repeatedly that it cannot self regulate. Granting public utility status to a private industry

with the track record of lying, intimidating and even threatening to get what it wants would be grossly negligent and irresponsible on the part of the PUC. We as Americans, have a Constitutional right to protect our homes and land. Ms. Wottrich has the right to choose not to lease her land for drilling, not to allow seismic testing, and not to have a pipeline across her property.

For the past 30 years, Ms. Wottrich has worked as an environmental educator and has taught thousands of children the need to live in balance with the natural systems on our planet. She has also taught them that every action has consequences. And decisions that involve negative impacts to the health of our environment need to be very carefully weighed. She moved to Susquehanna County with the goal of living her beliefs, and she grows and harvests most of her own food, lives in a house that gets its energy largely from the sun, and nurtures the natural diversity of her land in trying to minimize her carbon footprint. Now she finds that her way of life could be irreparably altered and that she may be forced to turn over the land that she has worked so hard to protect for something she believes is wrong, that her health and safety of her family could be jeopardized because of an industry that has been given carte blanche to operate as it pleases. She is adamantly opposed to granting public utility status to this or any other gas pipeline company. This is a private industry that stands to gain huge profits and wants the privilege to operate as a public utility. There is no public benefit to be gained this would be an environmental tragedy of epic proportions and she asks the commission to not allow it to happen. Tr. 85-92.

Elizabeth Janoski, adjunct college instructor in English, noted that haying is the cash crop in Susquehanna County and that it has been difficult to hay this season because of the orange extension lines running through the hayfields. She is a lifelong resident of the County and her family has been here for generations. She has some acreage left from the original family farm which has been in her family for almost 200 years. She has worked for the County in emergency management and conservation and economic development. She is currently in higher education. This County is about the land.

While this hearing is about the question of eminent domain status for one pipeline company, it will set the precedent for many others. The question of gathering lines is just one of the many issues that have arisen in this County which they are unprepared to deal with, from the orange extension cords getting tied up in balers to the explosions that happened unexpectedly which creates seismic waves to test for gas pattern in the rocks. She does not understand it and believes that the people are not prepared to deal with all of these issues which have arisen with the gas rush. The commission has an opportunity to slow down the process in order to consider the effects. The gathering lines are going to change the face of this County forever. They are going to make it difficult for the people that own the hayfields to make a living. They are going to affect the socioeconomic condition of every person who lives in the County and the commission has the power to slow down the process. She recognizes the need for economic development and also knows that some people are benefiting from what is happening already and that it's a good thing. But it should be slower. Tr. 92-96.

Bruce McNaught, environmental consultant, stated that ten years ago he and his wife were blessed with the opportunity to acquire his parents' property in Susquehanna County, a small piece of paradise. As his parents before him and the owners before them were all very careful in how they manage the land leaving as much as they can its natural state, protecting unusual species and encouraging biodiversity. His family chose not to lease for natural gas and have not received any financial benefit. Instead at their own expense, they chose to place a conservation easement on the property through a local land trust on their land in perpetuity. Now he finds that there is potential through the use of eminent domain for gas companies to cross his land and the land of others to access gas wells. He finds this outrageous, illegal and contrary to the private property rights that people have fought so hard for in this country. This industry produces a commodity that is being sold and sent off to cities in foreign countries far from Susquehanna County. Let the pipeline companies negotiate the routes through the properties of those who have leased to reach the gas wells. A pipeline crossing on his land negates everything he has worked for in acquiring his property, the way he manages it, the placement of his conservation easement, his ability to sell the land in the future, and the very reason that he did not lease his land in the first place.

He currently works as a consultant to the Pennsylvania Game Commission studying bird population changes. Many of our native species that depend on wetland habitats are declining because of forest fragmentation. For example, 12 percent of the wood thrush population and 17 percent of the world's scarlet tanager population live in the Commonwealth of Pennsylvania. Both of these species, along with a number of others all depend on large contiguous woodlots and have declined drastically due to habitat fragmentation over the last decade. Pipelines will further fragment woodland in environmentally sensitive areas. A pipeline affects these species mentioned not just by the trees removed but also by ecological change hundreds of feet into the woods on each side of the right-of-way. These changes include increased sunlight, introduction of invasive species and giving entrance to a host of predators to the woodlands. Essentially a 25 to 50 ft. cleared right-of-way impacts the forest with a football field wide swath of habitat destruction. Who will monitor this increase in environmental impacts? The decision of where to place lines should be a joint decision that includes the landowners' own wishes along with the guidance from the government environmental agency. Tr. 96-100.

Jim Barbour, owner and operator of Barbour Farms, testified that, as a land owner and businessman, he looks at people without jobs and has spoken with a number of people in the industry. He has seen some things that are going on that can be very positive. His farm is located between two of the major interstate lines: the Tennessee and the Millennium line going across into New York State. This area has a lot of potential from what we are seeing, a lot of revenue on a lot of levels. He knows many landowners who are looking forward to having a well so they can have royalties from that well. But it does not matter how many wells we have if there is no pipeline to move the gas. He quotes a Penn State professor, Rose Baker, who stated that for every well that is drilled, more than 410 people are employed in 150 occupations. Long-term, 11.53 full-time positions. As a businessman he sees this as a good thing. When he watches the trucks going through the local gas station, and the restaurant parking lots that are full he recognizes that the industry is supporting local economy. He is a third generation farmer and he does not know anyone who loves nature and wildlife more than he does. He grows produce and he has a contract with the applicant here. The pipeline proposed is going across his produce fields, and where it will be located, it will be buried. He will plow and plant right over the

pipeline so for him this is not a problem. This company has been cooperative in where to put the pipeline and has moved it willingly to cater to his wishes and the requirements of DEP when they marked the wetlands. He sees the progress is something that is going to happen that needs to be done in an environmentally friendly way. He believes that there should be laws and oversights in place to take care of difficulties which are being encountered. He is not an expert in the law; he simply loves his land and wants it to be taken care of. This company has been more than cordial in their discussions and in tracking the proposed pipeline where it suits him. Tr. 100-104.

Neil Turner, and Warner D. Smith, agreed with what the prior speakers had said and added no testimony of their own. Tr. 104-105.

Clifford Reed, retired from USF Red Star, recommended granting the utility status to the company but eliminating the eminent domain part of it. He believes that the companies should negotiate a fair price and lease in the proper way with no force or intimidation. He wonders whether after these companies have placed and sold the lines, will they be around to maintain the pipelines and oversee if anything goes wrong. Tr. 105-106.

Jackman Maynard, unemployed aerospace engineer, lived in Susquehanna County his entire life and is descended from one of the nine partners that settled the County. He and his wife own three small pieces of property and respect the landowners' rights to lease or not, to negotiate terms, to decide for their property what they think is best. There should be a reasonable development pace, no moratorium on the whole business. And he does not want to see farmers being foreclosed on waiting for things to happen. But neither should they be railroaded. The reasonable pace should be with good regulation to protect the environment but do not ruin the economy wildly. If there is a farm, you may be able to grow things on top of the pipeline, but it does restrict the use of your land essentially forever. It may mean that people use the right-of-way as a short-cut; it may mean that you cannot build your kids' house on that land because of the pipeline under it. One payment upfront that gives them the right to do what they want forever is not fair. He would be willing to sign what little land he has for pipeline use, with good protection terms, and annual payments. It has to be fair, and negotiated terms will result in that.

Granting a certificate of public convenience would take away the negotiation, and landowners don't need that. It is working the way it is. He asks the Commission to continue to support the rights of landowners. Tr. 106-110.

Rowland Sharp, owner of All Seasons Real Estate, with two offices and employer of a number of people, has lived in Susquehanna County for over thirty years and believes he has made a significant investment in the area. He owns various property, vacant, residential and even some commercial property where five businesses are located for skilled labor. They have leased no property for their mineral rights, and have no intention of doing so. His residential property is surrounded by property which has been leased to a gas company. His commercial property of 11 acres is bisected by the Tennessee gas transmission line, and that company is a good neighbor. He is concerned that there may not be oversight for the gathering lines like there is for the transmission line. He is also concerned that this case will set a precedent for the land is going to be taken in the future. He is concerned about the vulnerability of the water supply to his commercial property.

He asks that the Commission not grant public utility status to this company because of a number of reasons: reduction in the value of real estate, loss of negotiation for land use, no benefit to local population of small property and rural property owners, no economic development from jobs in manufacturing, and clean water. Tr. 110 -114.

Hillary Caws Elwitt, librarian in the Susquehanna County library system, focused on the definition of "public utility" as it appears in the Public Utility Code. She expressed surprise that there is even a hearing because she does not see how this company's activities fall within the definition. The definition specifically excludes any producer of natural gas not engaged in distributing such gas directly to the public for compensation, and Section 2202 also excludes suppliers who provide services in de minimus amounts. Public utilities are retail providers of crucial services to individuals and to businesses.

The Laser Marcellus Pipeline is for wholesale distribution of gas. The PUC's mission statement focuses on consumers and the public interest. Its mandate does not include

helping extractors of natural resources get their product to market. This Application tries to gloss over this huge contradiction by stating that it will offer, render, furnish or supply natural gas gathering, transporting or conveying service by pipeline to the public in named townships, but it will actually be transporting gas *from* the public. There are no natural gas public utilities in Susquehanna County because they are only practical in more urbanized areas.

Natural gas pipelines of any size are dangerous and must be carefully regulated, but that cannot involve turning the definition of a public utility on its head, violating the mandate and mission of the PUC and setting a risky precedent. She urges the Commission to reject this Application. Tr. 115-117.

Katherine Shelly, retired attorney, lives on 156 acres in a mostly wooded area at the top of a watershed in Ararat Township. The land is a tree farm which has been mostly leased for gas drilling. She understands the impact that this decision will have on her land. She is also the vice president of the Susquehanna County Farm Bureau, which counts 356 families as members. At the state level, there are 50,000 farm families who rely on clean soils and water to grow quality food that Americans depend upon. To enable this continued practice, drilling, gathering and transmitting gas should be conducted safely and in the manner that will not harm agriculture.

Gas has been piped from wells to transmission lines for decades in PA and throughout the U.S., yet this is a case of first impression. How necessary is public utility status? This case may determine outcomes for thousands of farm families, residents and landowners in this and the next generation. This Company should not be made a public utility. Tr. 118-123.

Philip DePue, dairy farmer, testified that he signed a lease early on with this Company. They approached his family for a right-of-way; we had a choice and never felt forced or even threatened in any way. We even had the option to ask them to take it off our property. The Company was very congenial in addressing our concerns. Mr. DePue and his wife believe that the Company's process of getting the pipeline through will improve the farmland. The Company is very congenial with the fences necessary to keep others off the land. Tr. 123-124.

James Slocum agreed with Mr. Giangrieco. Tr. 124.

Gene Famolari, retired from U.S. Army Communications Electronics Command where he was the chief technical officer until 1999, agreed with Mike Giangrieco (the first speaker). He states that, living on a farm and having had a lot of experience with both private and governmental organizations, he is sorry that the area needs the economic improvement and that the natural gas is a great asset and one that needs to be exploited. But to do that, pipelines are needed. At the same time, he is a landowner with a substantial farm and does not want to see the environment degraded, nor does he want to surrender his property rights. He wants to be able to negotiate where the lines go and how they come in. If one party had eminent domain, that party has a hammer and it is no longer a level playing field.

This is a major, ground-breaking precedent-setting case that impacts every landowner in the county and in the state. The real issue is very simple: whether to grant gas gathering pipelines utility status, with eminent domain rights. There is no compelling reason to do so now. He mentioned the en banc hearings that the Commission held regarding Marcellus Shale issues. More companies testified that they were planning to file for certification, and others can be expected to follow suit to maintain competitive parity in acquiring pipeline rights and negotiate with landowners under the threat of eminent domain.

Thousands of miles of gas gathering pipelines have been laid across Pennsylvania, without any eminent domain at all. This Company head has stated that he already has 60% of the rights-of-way without eminent domain, so why is this necessary? Without a clear and compelling need, eminent domain should not be granted, and there is no need here.

There is a serious issue about whether or not utility status is permissible here. He believes that this case is significantly far reaching and novel enough to require clarification of authority and policy by the Commission and, very likely, approval for new legislation. None of these conditions exist now, and it is premature to award eminent domain to this or any other applicant for a gas gathering pipeline. He stated that the testimony to the en banc hearings show that the companies want to be lightly regulated, meaning all the current flexibility for rate

setting, serving specific gas drillers and establishing groups, but with the added power of eminent domain. It appeared to him that the other companies believed that non utilities are able to respond quickly to producers' needs. He quoted from the testimony given by the Pennsylvania Independent Oil and Gas Association in the Commission's en banc proceeding at Docket No. M-2010-2163461 and stated that the transportation of third party gatherers will produce among gathering lines should not be considered as providing service to the public when producers are the group being served. Rates for gathering lines, location of lines, and seismic lines could be through negotiation between producer and gatherer with no involvement from any judicial agency. Any other approach would delay, discourage and prolong the time it will take to provide the full benefit of local gas supply to the consumer. He asks that this application be denied. He suggests that the definition of "lightly regulated," not include the power of eminent domain. Tr. 125-135.

John Trallo, music teacher, asks why we should even be entertaining the right for this Company to be considered a public utility because under the Public Utility Code, the PUC should not grant a certificate of public convenience unless it is necessary or proper for service, accommodation, or safety of the public. He does not see how this Company can possibly meet that one basic requirement. He believes that the one reason the Company is asking for this is to remove the power of negotiation from private landowners. Maybe the companies prefer to just roll over the landowners who have not signed or have chosen not to.

He is one of those who do not have a gas lease even though he has been offered one. He had Tye Ranch Geophysical come to his home on four occasions to ask them to allow seismic testing for pipeline construction. He would not sign, and on the last visit, the company attempted to intimidate him. He is not intimidated easily and asked them to leave and told them if the representative returned, he would be charged with trespassing. At that point the man says he certainly hopes that Mr. Trallo would, and he lifted his shirt and showed his weapon, stating that our state honors his right to carry. So he said when he comes back and he will be back, because he is going to have Mr. Trallo's land, for pipelines. He told Mr. Trallo that the pipeline companies, gas companies, are already in business with state government. He said that whether or not Mr. Trallo resists, he is going to lose. He said that when he came back, if he sees me

Mr. Trallo's wife or kid or one of his little puppy dogs come out of the house, he's going to assume that Mr. Trallo is going to attack him and he says he will defend himself, he'll win, and he will get away with it. He told me that Mr. Trallo will end up in the ground with the gas. He also told him that he is the only one telling the truth, which is he does not care about Mr. Trallo or the land or the water, only about the money that's in the ground. He said to call it gas or oil but it's nothing but money to him, and landowners are in the way. Our choice is to either take the few bucks and let them do what they want to or they are going to take it anyway.

With that kind of an attitude, Mr. Trallo has to question why the pipeline company, whether it's this Company or any other pipeline company would even need to consider asking for a certificate of public convenience and to be treated as a utility and have a right-of-way due to eminent domain if they say that they're going to continue to negotiate with homeowners and landowners. If they are going to continue to negotiate, why do they need the eminent domain? Mr. Trallo indicated that he had filed a police report. He called the main organization in Texas, which indicated that the testing organization in Pennsylvania is subcontracted by Chief Oil and Gas. Tr. 135-140.

Ralph Kisberg, recently unemployed, appeared in order to make the same point that the others have made over and over. No certificate of public convenience should be issued to this Company for the main and simple reason that they are not, by definition, a public utility. No service will be provided to Pennsylvania consumers of natural gas. No benefit will be derived by the public. In fact, only the potential for detriment to property rights will occur. Only the owners of the pipeline, well developers and land owners with wells on their property will benefit from issuing the certificate. Mr. Kisberg is a small property owner in Sullivan County and resident of Lycoming County, and he is particularly concerned with the precedent that may be set if this Company wins a certificate of public convenience in this case. He agrees with the prior speaker who explained that nothing that this Company is seeking benefits the general public. The lines are simply not necessary for the service, accommodation or safety of the public. The lines will be used to ship gas out of the state and into the Millennium Pipeline in New York. This is not our problem. And we have no reason to provide this Company a state-sponsored order to help in achieving this goal. Tr. 141-143.

David Kveragas, ERSI employee in Taylor, after reading the article from the prior day's Scranton Times, featuring comments by Mr. Karam, who is the current or soon to be owner of the Company in question here, he has to wonder how much Mr. Karam paid the spin doctors to come up with the comments. He has to ask why any company would want to have more government oversight when there is not much to begin with. The PUC brings a lot of rules. The only reason to want more is because they want eminent domain. The original intent for eminent domain is for the public good. As noted many times today, there is no public service here. This gas is going to leave this area to go into the Millennium Pipeline and get shipped somewhere else. There is no guarantee that it will even stay in the United States. The issue of how companies will get the gas from the wellheads to the distribution lines must be handled before leases and permits are even issued.

He notes that Mr. Karam lives in an exclusive and upscale area of Lackawanna County, and if the companies attempted to run pipes through that neighborhood, those companies would get hit with so many lawyers from Philadelphia they would not know what hit them. He guarantees that the head of the company would not want pipes through his own front yard but ours is a different story. While there are only six townships involved in this application, this will spread statewide. The Company thought it would be able to get what it needs here because it is sparsely populated. He is glad to see so many people.

The article quoting Mr. Karam indicates that the company will try to minimize incursion on property. Mr. Kveragas agrees that the company will try that if the lot owned is small enough but a large property would cost too much and that is why they need the eminent domain. They will go straight through the center of the property. He indicated that he has run into a problem with trespassers using rights-of-way from gas and electric lines on his property for recreational purposes and that the companies do not care. No one should be able to come to a landowner and say, we are going to put anything through your property unless it is the U.S. government for something that's actually for the public good. He questions how the state Legislature can pass off the right for eminent domain to unelected bureaucrats of the PUC who can make decisions that impact voters for which they have no control?

He is a zoning hearing officer himself and when he deals with an issue he tries to look at it through the public's eye and see what the public wants. He urges the PUC to say no to this Company. He emphasized that eminent domain should be an act of the Legislature not a point for bureaucrats to give away private property. Tr. 143-154.

Karen Dennis, stay-at-home mother, read a statement prepared by her and David and Carol Clemens. As homeowners in Great Bend Township, Susquehanna County, we strongly oppose giving Laser Marcellus Gathering Company public utility status with the right of eminent domain. Laser Marcellus Gathering Company is not a public services company, such as the electric or telephone companies which provide essential services for all citizens. Rather, it is a for-profit company that wishes to put in a gas gathering and transport line for its own profit. Unlike a public utility gas company, it will not be installing pipelines to provide gas to private citizens for their use, but, rather, to transport gas between gas producing companies and their corporate customers. Laser Marcellus should not be allowed to become a public utility with the right of eminent domain. With this right, it would be allowed to take private land to further its own for-profit operation. This company would not be providing a service to all citizens, but only to gas companies to desire to transport their gas for profit. If Laser Marcellus wishes to do this, it should be required to buy the rights-of-way that it needs, just like any other for-profit company. Thank you. Tr. 154-156.

Glenn Love, retired PennDOT employee, owns about 180 acres and has no nearby neighbors. When he purchased property, there were already two pipeline rights on it: a 40-foot right-of-way for Sun Pipeline and a 50 ft. right-of-way for Buckeye Pipeline. He describes his dealings with a company which offered him \$15.00 per foot to build a pipeline across his property. He noted that about 3 1/2 years earlier he was told that the going price was \$25 per acre. He did not agree this time. He believes that the companies are using private property adjacent to public right-of-way now, without permission or compensation, as staging areas for installation of the pipeline in the public right-of-way. If they run rough-shod over people without eminent domain, what will happen if they get the right? Tr. 156-159.

Nadia Steinzor, is employed by and appearing on behalf of Earthworks Oil in Gas Accountability Project (OGAP), in Olster County, New York. OGAP's mission is to work with communities to protect the homes in the environment from the impact of oil and gas development. She serves as the Marcellus Regional Organizer for Earthworks and OGAP. Given the long-lasting impacts of all stages of gas and oil development on communities and land, it is vital that strong regulations and widespread monitoring systems exist.

This is a matter of public health, safety and government responsibility. The PUC should take this approach when it comes to pipelines and this application. Regulations should be in place before deciding the status of gas pipelines. Regulation would align pipeline building with location and demand and minimize disturbance to the natural environment in human communities.

This application is based on plans to transmit gas from wells in Pennsylvania to New York, and, therefore, advances the interest of gas producers shipping gas out of Pennsylvania, not the public that would be impacted, as required by the Public Utility Code. In addition, the PUC's responsibility is to all residents of Pennsylvania. Lack of PUC oversight for the infrastructure required for this gas development, including the gathering lines, will increase the risk that problems such as leaks and erosion occur which, in turn impacts water quality. Granting the power of eminent domain would weaken the ability of land owners to negotiate over the right-of-way, surface disturbance, use of their property and other aspects inherent in maintaining control over land and its very well-being. OGAP recommends that the PUC retains jurisdiction over pipelines, including gathering lines, and deny this application. Tr. 160-164.

Diane MacInnes, retired teacher in New York, thanked the other participants who were speaking so eloquently. She emphasized that using eminent domain is a very dangerous precedent. In New York, drilling has not yet begun, and New York is watching Pennsylvania very closely. Tr.164-167.

Rebecca Rotor, homemaker who lives in both Bucks and Susquehanna Counties, stated that granting the power of eminent domain to this and other private companies would have a serious

impact on the property values, watershed and air quality as well as on the health of the total environment. She is most concerned about the physical safety of the community. Eminent domain would allow the private companies access to private land and property owners would lose the right to say no to private gathering lines like this one. This would increase the drilling pace and industrialization of this world area where there is no zoning. One can imagine all the requisite interstate gathering and transmission lines and compressors to transport the natural gas out of this County to the national and international markets as reported by some news stories.

As the number of gas pipelines increase, so will the chance of accidental explosion, whether it be from evacuation like the deadly Moundsville, Texas explosion this past June or from corrosion of pipelines over time. Who will be responsible to the community, if there is an explosion? What emergency management plan has been proposed by him and what fire company would be prepared to deal with such a fire? Our world infrastructure does not have the finances, experienced manpower more equipment for such a catastrophe.

Her safety concerns were addressed but not dispelled by an article that appeared in the Times Tribune on June 8th written by Harrisburg bureau chief Robert Swift, and she quoted from the article: the PUC told a panel of lawmakers Monday they won't seek inspection rights over gathering pipelines in Class 1 areas defined as having 10 or fewer occupied homes over one mile. This policy was set despite the PUC's acknowledgment that many pipelines connecting the Marcellus Shale wells to larger transmission pipelines will be in Class 1 areas. The federal government, which has primary inspection authority, doesn't inspect pipelines in Class 1 areas either. The reason is pipeline inspectors are stretched thin and the federal risk assessment shows safety concerns are greater in more heavily populated areas, said Paul J. Metro, the PUC's chief engineer for gas safety. If a breach occurred in the gas pipeline, there would be a risk of a forest fire and dying trees, Mr. Metro said. "Hopefully that would be the limit of the risk." The PUC has eight inspectors for 40,000 miles of existing pipeline located in Pennsylvania.

This article answered Ms. Rotor's question regarding who would be responsible for the safety of taxpaying families, living in sparsely populated rural communities in the face of

a pipeline explosion, who would have the emergency management plan, whose fire trucks and manpower would protect the family during a pipeline explosion? The answer is no one. The PUC's safety plan for those in sparsely populated areas, which most of Susquehanna County is, seems to be to cross their fingers and hope only our trees and forests burn down. She is very troubled about the lack of concern for human life and the environment in Class 1 areas. In the face of the rapid industrialization of natural gas production in rural areas with no zoning, there has been a conscious or seemingly conscious decision by federal and state officials to have no pipeline inspection, safety or emergency management plan in sparsely populated rural areas. In other words, those living in a rural area with less than ten inhabited homes in less than a mile, there are no plans to protect you. The citizens can find themselves, as property owners, with no right to deny access and no ability to protect homes, habitat and lives in case of a mishap. She asks that the PUC apply the same standards used in Class 3 areas to Class 1 areas, because the lives of people living in Class 1 areas are important and deserve equal protection. Tr. 167-174.

Michael Kaschak, electronic technician for the U.S. Postal Service, testified that Western Land Services told his wife last year that they would come in and put a gas pipeline 20 feet from his house, right through his land and that he and his wife would have no choice. As an American citizen and a veteran, he believes that negotiation is the only way to deal with the situation and there is no reason for eminent domain. Kaschak Exhibit No. 1 is a map left by Western Land Services. Tr. 174-176.

Shary Skoloff, has an organic farm with a conservation easement which is moving into becoming a research center for sciences with a few universities. She believes that the public interest far exceeds the interest of a company selling and transporting for profit. She is opposed to this Application. Tr. 180-182.

B. The American Legion, Montrose, PA July 7, 2010

Bob Wert, senior director of Blank Rome, LLP in Philadelphia, owner of Rosemont Inn and the Montrose Country Store, presented written comments. He presented a number of questions and addressed each in turn.

1. Standing. Applicant is a limited liability corporation incorporated in Delaware without a legal representative for service of process in Pennsylvania. This could change with Mr. Karam's purchase.

2. Public utility. Mr. Wert's written materials include a number of sections regarding whether this is a public utility. Most of us think of a utility as something that delivers something to each of us but that will not happen here.

3. Eminent domain. This is the ability to take private property for a public use. The exercise of eminent domain must be approved by the government. There are four elements set forth in the Fifth Amendment of the Constitution. (1) Property must be private. (2) It must be taken. (3) It must be for public use. (4) There must be just compensation. The question here is whether or not this pipeline is really for public use. Is it going to benefit the citizens of this County? It is not. It will benefit those who are the owners of the company.

4. Competition. Other gathering companies have intervened or protested in this case. What will the extent of the application be if granted? What are the powers and authorities which will be granted?

5. Safety. What standards will be applied and which agency will have oversight to ensure that the pipeline is properly stored or maintained? The executive director of the Wyoming County Office of Community Planning submitted written testimony in which he said that he strongly suggested that PUC be given regulatory authority to address all collection in gas gathering pipelines within the Commonwealth, as currently done by the PUC gas safety division as part of their relationship with pipelines and hazardous materials safety administration. This regulatory oversight is done without requiring pipeline facilities to meet its definition of a public utility. The pipeline in developed, and all rural areas, within Pennsylvania should be required to meet the same safety standards as a Class 3 pipeline.

6. Environmental impacts. These should be thoroughly identified at the outset and addressed in the design and construction of the facilities. He urges the PUC to come

out with some clear guidelines and to determine who is going to be involved in the oversight of this operation.

7. Financial responsibility. Appropriate capital must exist to finance operations such as this. The financial statements filed as part of the application indicated that the applicant has a financial picture which shows a value of \$37 million. How much is for construction and what is there for the response to disaster and damages? More information is needed.

8. Potential benefits. Build it for value for the long run, include experts, apply safe standards, minimize damage to land and environment. Tr. 200-218. (A number of witnesses ceded their time to Mr. Wert in order to permit him to speak longer.) His legal memo is labeled Wert Exhibit 1 and was admitted to the record. Tr. 200-219.

Keith Oberg, home inspector, is opposed to this application. He stated that only a true public utility should be entrusted to wield the power of eminent domain. This gathering pipeline does not represent a public service to the residents of this community or any other community of Pennsylvania. The costs will be borne by the gas developers, not the local land owners who have leased their land and receive royalties based upon percentage of gross revenues. Applicant appears to want the rights that accrue to public utilities without the intensive regulatory oversight that such a grant would and should require. The development of the Marcellus Shale gas resource is a massive new venture that is growing faster than the development of a proper regulatory environment. Granting the right of eminent domain would further compound and threaten the public safety and the potential for serious environmental degradation resulting from inadequate regulation, especially if the application includes not only central gathering pipeline but the lateral or feeder pipes from well pads. Local land owners, many of whom are third and fourth generation landowners, must be entrusted with the power of determining what is best for their land and the safety of their families. Eminent domain must not be granted lightly. While pipelines are a necessary part of the development of the Marcellus Shale, a grant of authority from the PUC for certification as a public utility is not necessary. Other gas gathering lines are

being successfully developed without such a grant. Landowners are being properly compensated, their wishes are being heard and gas is being delivered to interstate pipelines.

He is a land use committee chair for the E.L Rose Conservancy, which owns a piece of property in Dimock, with gas wells all around it. Another company wanted to place a pipeline across the property but he was unwilling to grant that. There was no problem or threat of eminent domain. They found a new route and everybody was happy. The gas went to market. Tr. 219-222.

Drake Saxton, retired from New Penn Motor Express, urges the PUC to reject this application because the company is not entitled to public utility status under Pennsylvania's Public Utility Code. The law says that the PUC should not grant a certificate of public convenience unless it is necessary for the service, accommodation or safety of the public. This company's pipelines advance the interest of the gas producers that want to ship gas out of Pennsylvania. The gathering lines are not necessary or proper for service, accommodation or safety of the public. Laser Northeast Gathering is a for-profit corporation that is attempting to legalize its taking of private property for profit, but masquerading as a public utility to obtain the power of eminent domain. Gathering line operators have not been considered public utilities under Pennsylvania law up until now.

Public utilities were created to ensure that consumers receive reliable service of basic necessities, such as water and electricity, at reasonable rates. Through its application, Laser is attempting to deprive Pennsylvania landowners of their ability to freely negotiate the free market value of their properties and to restrict the use of their properties. There will be no delivery of public goods or services provided by this proposed project to the citizens of either Pennsylvania or New York. This system is intended to be a transmission line and the purpose of the pipe is to transmit gas from Pennsylvania to New York, and interstate pipeline.

There is no disclosure of the identity of the partners involved. There is limited disclosure as to whether the \$37 million is in cash, stocks, bonds, or other securities. No disclosure has been made as to whether these alleged funds are encumbered, reserved or

leveraged. And if so, how, to whom, and by whom. We do not know how the limited information provided in the application will be affected by the recent acquisition of Laser Northeast by Delphi Midstream Partners, LLC. We respectfully ask the PUC to require the submission of a new application. This would reflect the new acquisition so that the public can evaluate and comment on whether the applicant's technical or financial fitness to operate has changed. The PUC's own regulation requires that it consider zoning ordinances and local comprehensive land use plans in reviewing applications for the permitting of infrastructure including applications for certificates of public convenience. This is evidence that the PUC can and should regulate the siting of gas pipelines before it grants a certificate of public convenience to gathering line operators.

The construction of pipelines carries significant risks for public safety and consumer protection. With every additional mile of pipeline construction, these risks necessarily increase.

Moreover, the location of pipelines is not neutral with respect to the PUC's jurisdictional concerns. Pipelines constructed near occupied buildings create dangers not presented by those located reasonable distances from people and property. Pipelines located near water supplies or which run through forests which protect water supplies threaten more contamination than those affording generous buffers avoiding unnecessary land and topsoil clearance.

The PUC cannot fulfill its statutory mandate to protect safety and to ensure that water utilities deliver services at reasonable rates if it does not oversee the siting of pipelines within the Commonwealth. While exclusive service territories may not be ideal, there must be some coordination mechanism for pipeline construction that prevents competitors from building redundant and unnecessarily constructing lines. Without PUC oversight of pipelines siting, water utilities and their customers will be placed at unnecessary risk because there will be no means to prevent gratuitous land clearance or to direct lines away from water resources. Before the PUC even considers whether to grant public utility status to a gathering or transmission pipeline operator, it should promulgate regulations governing the siting of gas pipelines and

restricting eminent domain powers. This authority exists under the Public Utility Code which says that every public utility may have reasonable rules and regulations governing the conditions under which it shall be required to render service.

The PUC should require pipeline operators to obtain siting approval of every proposed pipeline. The information required should be at least as detailed as that already required in siting applications for electric transmission lines. It should include at least the proposed route of a pipeline, including the number of the route miles, the right-of-way width and its location, the names and addresses of the property owners within the proposed right-of-way and an indication of the property to be acquired by the applicant to construct the pipeline, the need for the pipeline, identifying the present and future demand for gas transportation services, how the line will meet that demand in an engineering justification for the proposed pipeline, the safety considerations that will be incorporated into the design, construction and maintenance of proposed pipeline, the environmental impacts of the pipeline and the efforts that the applicant has made to minimize the impact of the pipeline on the environment and upon scenic and historic areas, including but not limited to impact, where applicable, upon land use, soil and sedimentation, plants and wildlife habitat and drilling, hydrology and landscape. Efforts by the applicant to locate and identify archeological, geologic, historic, scenic or wilderness areas of significance within two miles of the proposed right-of-way and reasonable alternative routes to the proposed pipeline, including a comparison on the merits and the merits of each route. Additional suggestions mirroring existing electric transmission line requirements were included.

The witness strongly objects to the extension of eminent domain power to any entity not fully regulated as a public utility and he emphasized the need for PUC oversight of pipelines siting even when the construction is undertaken by a fully regulated utility. He urges the commission to consider creation of a joint task force to investigate options and make recommendations for a planning process and siting regulations to address the commission and concerns of the PUC as well as the Pennsylvania Department of Environmental Protection. The statement was marked as Saxton Exhibit 1 and admitted to the record. Tr. 223-235.

Craig Leland Stevens, self-employed in an air and water treatment business, stated that he is the sixth generation owner of a 115-acre property in Susquehanna County. This property hosts a major power line as well as two natural springs that originate on the land and flow down the Silver Creek, into Salt Springs Park where his grandmother was born on the property in a cabin that still stands there on Buckley Road from 1912. In 1994, gas and oil companies were trying to sign leases for 5 dollars an acre. In 2007 companies were offering \$50 per acre.

Nine weeks after the death of Mr. Stevens' father, Chesapeake went to Gracious Living Care Home in Montrose and signed his 95-year-old grandmother to a \$50 an acre lease without researching the deed. Had they done so, they would have found she was only a life tenant and deeded owners were Mr. Stevens' father, his aunt and his uncle as equal tenants since 1995. As a life tenant cannot convey real property in Pennsylvania, this lease is being revoked. Laser had Mr. Stevens' great aunt sign as power of attorney for his grandmother eight days before her death. PGS Surveying signed only his uncle for property with five owners and is attempting to use a 1 percent rule which he does not believe exists in Pennsylvania.

Laser Midstream offered him 5 dollars per foot which would have meant a whopping \$1700 for a lifetime permit of an easement. Recently he was told that the offer per foot had gone up to \$15 but there would still be no annual payment.

He asked what the definition of public utility was. He has a power line on his property and can turn on the light switches in the dark. He has a phone line and can hook that up to a phone and magically communicate with people. He has a cable service to his home and can get Internet service with it. If he allows this company onto his property, what is offered to his neighbors? Will they run lines to his dwellings and provide him with clean burning natural gas to use at home? He's currently on oil heating and would love to save the money.

Unless the pipeline company is supplying gas at regulated prices, it should have to negotiate individually and provide annual payment as companies do in Alaska. He feels very special that he was asked to be a part of the pipeline since only 150 plus owners along a 30 mile line through Pennsylvania and New York were asked. He wishes he were special enough to be

compensated properly however. When the company comes with requests and wants to buy his house for 5 dollars and he says no, and the company comes back with the sheriff and takes it from him, that is not a negotiation, that is theft. Tr. 235-241.

Gerald Rogowski, employed by the Commonwealth, testified in support of the people of this County because as a private landowner, he does not want somebody coming up to the door and telling him, after he spent all this money in time and improvement that they were going to put a pipe on his land. His land is everything. Tr. 242-243.

Roger Swetland, retired from Proctor & Gamble, held a right-of-way agreement from Appalachia, which states that it can be transferred to anyone at any time. He has a map showing the layout approximately 100 feet off the actual highway and boundary lines of the property, through a three and a half acre pond, through his brother's front yard and across the end of his property. It does not specify the size of the pipeline but says that it can include fracking fluids or other fluids, gas and otherwise. There is no statement of liability on their part that he can see. There is a land owner responsibility clause in this contract that he is liable if there is damage to the pipeline whether or not he created that damage. He will pay the taxes on it. It says the line will be three feet deep but he requires a minimum 5 foot deep line because he does not want to drill into one. He already has a telephone line and power line right-of-way across his property. Now this company seeks a 100 foot easement and 50 foot right-of-way for \$100 for ever. Plus he's paying the taxes. Neither will he be permitted to plant trees on which means that he is losing income in the future as well. His exhibit was marked as Swetland Exhibit 1 and admitted to the record. Tr. 243-249.

Frank Finan, retired from being a self-employed woodworker, stated that last December, Laser Midstream Company as it was called then, held a meeting with landowners and he wanted to present a five-minute clip of his hour long video. Counsel for Applicant objected, and the objection was sustained. The video was not shown. Mr. Finan testified that the companies suggested that water lines, power lines, all have eminent domain and gas companies also have eminent domain. After the meeting, he would have thought that eminent domain was already possible and in fact that is not the case. Tr 249-255.

Trudy Gerlach, self-employed as an artist, asks the commission to not grant public utility status to this applicant. The main purpose of this application is to acquire the power of eminent domain in order to put pipelines and other structures, such as compressor stations, anywhere they choose whether or not the landowner wishes it. While this is just one pipeline company, granting public utility status to this company would set a precedent for granting the status to all pipeline companies in Pennsylvania. The surface of our entire state is underlain by natural gas which would then belong to the pipeline companies to do with as they wish.

Two of the PUC directives are to ensure safe utility service and to foster new technologies in an environmentally sound manner. Pipelines have not been determined to be totally safe. There have been instances of accidental release and explosion of gas. Compressor stations release dangerous substances into the air. Construction of pipelines is a massive operation which damages the environment directly by disturbing the habitat over large spots of land and potential for runoff and sediment is a major threat to surface water quality. Most Pennsylvania landowners want to care for their property and want to be good stewards. This move will remove our property rights and our choice to be responsible stewards over the land we care for. Tr. 256-257.

Craig A. Saltner, Leanne Mazurick, Karen Belli, Karen Fry, and Herb Baldwin all agreed with the prior speakers.

Ellie Hyde, employed by the County of Lackawanna as the administrator for the Farmland Easement Program, testified that the Branch Tunkhannock Creek Watershed Coalition, a group of citizens advocating the protection of the waters of the South Branch Watershed requests that you deny this application. We strongly feel that PA PUC needs to be given regulatory authority to address all collection and gathering gas pipelines within Pennsylvania. This should be done without requiring all pipeline facilities to meet its definition of a public utility. Given the present lack of regulation and enforcement for the gas drilling industry in Pennsylvania, along with the extreme high pressure from the Marcellus Shell, the potential for disaster is great. We strongly feel that this is not a justifiable use of eminent domain. Tr. 259-Tr. 260.

Mary Felley, employed by the Countryside Conservancy, testified that the organization is a 501(c)(3) non-profit land trust, dedicated to protecting lands and waters in and near the Tunkhannock Creek Watershed for the public benefit now and for the future. This Conservancy opposes the grant of public utility status to the applicant. They do not believe those companies should have the authority to exercise eminent domain and condemn land as they see fit. While Laser has promised not to use eminent domain as a bargaining chip, the reality is by granting them utility status and the use of eminent domain, the PUC will nullify the power of the landowners to resist unwanted development on their property.

The Countryside Conservancy has protected nearly 900 acres of land in northeastern Pennsylvania through conservation easements, concluded with willing landowners, and has acquired over 200 acres of land for the education and enjoyment of the public. Its ability to protect these existing conservation commitments, and its ability to carry out conservation in the future will be threatened if eminent domain powers are extended to this company or other companies like them. It will no longer have the ability to protect the landowners that it had promised to protect. While it recognizes the importance of regulating pipelines crisscrossing the Commonwealth, it does not believe that granting public utility status to a midstream pipeline operator is the appropriate means for achieving this goal. Regulation should be a priority but it should not be the grounds for the PUC to grant public utility status. Tr. 260-263.

Richard Jordan, local attorney, testified against granting public utility status to the applicant. There is no logical reason why a company would want to subject itself to PUC regulation except to acquire the power of eminent domain. The power of eminent domain means that the company has the right to condemn property and offer what they state is just compensation. The formula for just compensation will be based on some sort of per acre valuation based on what acreage goes for in this County. Right now perhaps something in the neighborhood of \$4,000 or \$5,000 is the amount.

If a landowner does not like the “just compensation” which they've offered, the landowner has the burden of filing and asking for a board of view. The landowner will have to present expert testimony at the board of view to establish that the just compensation is not just

compensation and here is the problem. The compensation which the company has been offering does not take into consideration what is referred to as severance damages.

Imagine that you have a 24 acre property and want to run a pipeline to the middle of this property. What happened to the value of your property? If they are paying you only for that acreage where they put the pipeline, you have severance damages which are going to be very very difficult to prove. How many of the landowners will have the wherewithal to identify an expert, hire the expert, pay the expert, and spend time before board of view? The board of view may or may not agree with you and the gas company can take an appeal. That appeal goes to the Common Pleas courts where the pipeline company can get a jury trial. That is going to be pretty expensive. Most landowners do not have the wherewithal to continue the fight. If they do not like what happens in the Common Pleas courts, they have the right to take appeals.

Very few of us are going to have the wherewithal to carry that fight the distance. Eminent domain powers cannot be extended to these pipeline companies. It is simply too unfair to the landowners.

In addition many landowners have negotiated with the gas companies for non surface access leases. These were carefully drafted and precluded pipelines on their property. If these pipeline companies can hide behind the subterfuge of being a separate corporation and therefore, not be bound by the lease, they can use eminent domain power to override what has carefully been negotiated. That is a taking without just compensation. Tr. 263-267.

George Turner, licensed professional geologist in Pennsylvania, testified that he does a lot of water sampling and water testing for a lot of people. He recognizes some faces here and knows that he has tested some of the wells of the people here. He came to make a brief speech. The idea of giving gas gathering companies public utility status so they can use eminent domain to take land, without having to bargain, or pay some kind of fair price, is just not something that should be done in this country. Tr. 267-268.

Leslie Avakian, is a technical recruiter who is self-employed. He believes that these hearings should extend beyond Susquehanna County and be held statewide. He does not agree that the company should be granted a certificate of public convenience because they do not meet the definition of a public utility. This is a decision that would greatly impact residents throughout the state. Most of the Marcellus exploration areas cover much of Pennsylvania. While this is valuable here, it is not an adequate forum to solicit input on this key topic because it has implications that extend well beyond details of this application.

Gathering pipelines are not public utilities and are not entitled to the powers limited to actual public utilities. The power of eminent domain is the key issue here. This is not the same as power transmission lines or the extension of an existing highway or the addition of interstate pipeline. The impact of granting this new class of activity a certificate of public convenience is exponentially greater. There are literally tens of thousands of wells forecast for development throughout Pennsylvania and while spacing is often less than half a mile, all wells would go interconnected with gathering lines. Imagining this on a grid, one can see that a very high percentage of landowners in any gas development area have the potential of being impacted by gathering pipelines right-of-ways. This development activity has a potential of being as dense as roads in the suburbs, impacting virtually everyone in gas development areas throughout Pennsylvania in some way. This potential widespread loss of property rights goes to the very heart of what it means to be a property owner in Pennsylvania. Losing the right to prevent pipeline intrusion would leave the door open to impacts that may be devastating to planning for the future use of land.

Pipelines can be below or above ground, bisecting properties and making the other side that is difficult or impossible to get to and leaving remnants that are inaccessible, oddly shaped or rendered useless. It can alter views and density of wetlands, create sidelines and remove coverage that provided visual privacy and sound barriers. Many of these pipelines would be Class 1 pipeline, completely unregulated and forced onto an unwilling property owner. While an individual landowner can, in theory, be compensated for special case property impacts for clearly defined common public needs like a power line or road expansion, it is not possible or

reasonable to compensate the entire regions for a much more widespread impact that does not serve the public.

He recommends promoting natural gas exploration in a manner which makes the activity safe and acceptable to a willing public. He urges the PUC to recognize that directives to promote the development of natural gas ought to be read as directive to the PUC to regulate all pipeline exceptionally well, and allow landowners freedom to choose to partner with the industry or not, as a directive to promote this activity in a safe and acceptable way to the public over the long term.

The people here tonight are worried that the PUC will grant a private industry the right to put a dangerous, profit-oriented unregulated business venture on their land, in their homes, against their will. They know that pipelines are expensive. They know that companies cut corners. They know that problems happened. They know that class 1 pipelines are unregulated. These things do not promote, but, rather, hold back the development of the natural gas industry. Tr. 269-276.

Dr. Thomas Giunta, foot and ankle surgeon, began by stating that he agrees with just about everything that was said so far. He agrees that the PUC should deny the application for a certificate of public convenience. It is basically a corporate convenience. Gathering line companies should have no special powers, exemptions or waivers in conducting their business and should never be allowed to usurp private landowners' rights to conduct their business or reside in their homes. He believes that only holding two hearings on this precedent-setting case is an affront to the sensibility of the people of this Commonwealth and he agrees wholeheartedly that we should not even be having this discussion. This is our elected politicians and regulators doing the bidding for the corporations to have their way with our land. This is America. And we shouldn't even be having this discussion. To have this type of precedent-setting discussion in this manner, in two spots in the state that are not the most convenient to get at, when this activity is going on throughout the whole state, is unconscionable. Tr. 276-279.

Rena Rothschild, retired from medical management, lives in Harvey's Lake, a natural, spring-fed lake which sits in a pan. If one pipeline is damaged, or if one fracking session damages any water or any physical formation, it will result in the loss of the largest natural lake in the state. She also has a private well, and she is concerned that the threat to the water is not being given due consideration. Tr. 279-281.

Bonnie Gulbin, employed by the Commonwealth, testified that her father, Kenneth Ellie, died almost a year ago in Dimock on land that is now worthless. The gas industry is corrupt, and those of us who signed have made a deal with the devil. She is the 7<sup>th</sup> or 8<sup>th</sup> generation to live on Ellie Mountain in Dimock. She wants the gas industry to understand that these are people's homes and lands, and the gas industry does not seem to know or care what they are doing to them. She stated that the majority of the people do not want the companies to make the decision whether a pipeline should go through a property. Tr. 281-283.

Angela Seyler, mental health therapist, completely disagrees with the idea that a natural gas company should have the power of eminent domain. This action threatens the basic rights of Pennsylvania landowners to negotiate their own contracts with gas companies and ultimately have their own say about whether gas companies can construct their pipelines on private land. It would give the companies an unfair advantage that will force the hand of property owners. While the company claims that eminent domain is a card that will be used sparsely and in rare cases, it will be a card that will quickly and cheaply gain access to whatever they want and it is her opinion that they will use it often, especially as opposition to natural gas drilling grows.

This will accelerate the development of the Marcellus Shale in an unsafe manner to the detriment of the environment. This company does not fit the description of "utility" under the law, and the law should not be manipulated to include them. The companies are not going anywhere and have just begun their quest for natural gas. They must be held to negotiating with individual landowners rather than being able to circumvent the negotiations by arguing for utility status. Landowners should be able to control their own land, whether the companies like it or not.

The natural gas boom has been overwhelming for everyone involved – citizens, regulators and legislators alike. Please do not allow these companies to gain unfair advantages because all are caught off guard by the quick influx and slow dissemination of information about the potential problems that they may cause to the state. Tr. 283-286.

Barbara Wilder, homemaker, is concerned with the safety of the pipelines. She presented photographs of the gas line rupture in Johnson County, Texas in June. The gas is transmitted under enormous pressure and it is wrong to compel people to risk the danger involved. Tr. 286-288.

Bret Jennings, environmental site representative, Great Bend Borough Councilman, and director of the Hallstead-Great Bend Joint Sewer Authority, presented testimony to support denial of the application. The definition of a public utility does not include a producer or manufacturer of gas not engaged in distributing the gas directly to the public for compensation. As of now, there is no state enforcement of the proposed pipeline. And even if the PUC is allowed to enforce the Federal Code of Regulations, there are 10 listed inspectors and one supervisor to inspect the pipelines in the Commonwealth right now. Mr. Jennings runs through an explanation of standard practices used by environmental professionals as set by the American Society for Testing and Materials. In his opinion the addition of the pipelines to the region would result in reduced property values and threat of prosecution from the environment protection agency for increased pollution and degradation of natural resources. EPA's prosecutions may include more stringent storm water management regulations and sediment and erosion control regulations that increase the cost of development throughout the Commonwealth. Wastewater treatment plants could be affected by having reductions imposed on what they can discharge by permits. Reductions in the sale price of properties with or adjacent to the gas pipelines could lead to challenges to assessed values and cause local property taxes to be lowered thereby reducing tax income by County, school districts and local municipalities. The costs to property value and reduction in taxes are a major concern since it is a cost of the public to a private business using eminent domain. The overall development within the Chesapeake Bay watershed could also be negatively affecting the cost of development and wastewater treatment. Tr. 288-297.

Mike Grossman, an insurance risk manager for the County of Waring, New Jersey and property owner of 116 acres in Harmony Township, Pennsylvania, opposed the application. He stated that there are four classes of people affected by this application: those who signed company leases granting very liberal interpretations of pipeline rights-of-way, those who signed restrictive clauses on leases which stated they would not have any surface activity whatsoever, those who spent hundreds of thousands of dollars to develop a lease to give them absolute control of issues such as where, when, and how pipeline was to be placed on their or any other lessor's property within a large group, and those who sign no lease whatsoever. He supports responsible gas exploration and drilling but state that eminent domain is the real crux of the situation and why we have a standing room only crowd at the hearing. It is the right of every citizen anywhere in America to dictate their own property rights. They should be free to negotiate openly with the Company and not be influenced by eminent domain for absolute taking of property. Tr. 297-299.

Janine Dymond, occupational therapist for her own business, Encore Therapy Services Inc. stated that after listening to the excellent testimony given earlier, the PUC can only come to a conclusion that eminent domain in public utility status would be a bad idea. The only purpose of this pipeline getting eminent domain would be to increase their profits. There's nothing wrong with profit. It's a good thing, but it has to be earned and not manipulated. If the gas industry were truly honorable, it would be spending more time earning our trust to be in a position to negotiate with us is truly for our benefit and theirs as opposed to finding loopholes and angles to block our rights as citizens, as opposed to influencing our legislators and to regulate and put restraints and oversight on the operations to the point where it is a safe industry and is not taking away our rights as citizens. We need to be angry not just with this company but with the regulatory boards and our government for the lack of oversight in allowing this industry to enter in the way it has and to do the damage that has happened. Tr. 300-301.

Barbara Scott, a public school teacher in Liberty Township, stated that she cannot get around a private company that does not appear to be, sound like or smell like a public utility, changing its name and requesting permission to act like one. Why should private investors be allowed to financially gain from the savings that come from eminent domain? This concept is so unfair she

cannot see how a decision to grant a private company public utility status the right to condemn property could possibly be in the public's best interest.

Without eminent domain, the company will have to work harder and pay something more to landowners and perhaps go around someone's property to achieve its goal. But this is the nature of the business. She does not understand why the company is not negotiating with landowners to determine what is best for both the Corporation and individual landowners, and by definition, the public. She is a landowner in Liberty Township and takes her responsibility as a steward of land seriously. She is a serious gardener with extensive vegetable, flower and shrub gardens and a small orchard. It keeps her up at night contemplating the possibility that a private corporation has decided it knows best about what the land, including her private holdings and Liberty Township should be used for. This whole scheme just seems to be another guinea pig plan to take advantage of the residents of beautiful rural Susquehanna County. Tr. 302-304.

Arthur Plaxton, retired professor of financing and statistics, traveled over 100 miles because he believes the grant of eminent domain to a gas collecting company would threaten his 160 acre farm in Lycoming County. In no way should a person be forced to give up the right to decide who can access his property and what his property is used for. The grant of a right-of-way to a pipeline company is permanently giving up important fundamental private property rights. He cannot plant trees, and landowners have to permit gas line personnel entry rights.

We accept eminent domain where there's a clear public necessity for almost everyone, such as electricity or public highways or a public school system. The natural gas is not a necessity. He lives without natural gas and has neighbors without natural gas and they go along fine. There are probably millions of people in the state don't have natural gas.

His second point is that the introduction of eminent domain drastically changes the tenor of the negotiations. As a lawyer from Montrose pointed out, it is difficult for a landowner to fight the gas companies. In his own life, he has been involved in a legal battle with a subsidiary of Duke Energy Corporation of Tokyo, Japan and his search for a prominent,

influential law firm in Philadelphia resulted in being told that the firms already represented the other side.

His third point is that he is threatened by the possible grant of eminent domain to this company because once it is granted in Susquehanna County, the same situation will exist elsewhere. The precedential value is inescapable. He stated that, as a graduate of the Wharton School of the University of Pennsylvania, he is impressed by the creativity shown by this company and its attempt to make money. Of course, the land will be purchased more cheaply through the use of eminent domain and therefore, the shareholders will profit more. Tr. 304-312.

Christopher Denton, attorney in New York State with a practice in oil and gas, representing landowners exclusively. He also teaches continuing legal education courses in oil and gas law, and presented a “cliff notes” version to the crowd. His testimony is summarized in the “Discussion” portion of this Decision. Tr. 312-329.

Craig Sauther, employed by Frontier Telephone, opposed the application. He brought a gallon jug of brown water which he stated was from the well at his home in Dimock. He has been living with contaminated water for two years and has a water buffalo in his garage for the 550 gallons of water delivered daily to his home. He stated that his well was contaminated as a result of fracking. On Carter Road in Dimock, there are 6-inch PVC pipes sticking out of the wells to vent the gas. His daughter was ill from the gas in the water system, and his neighbors have been ill (rashes and diarrhea) as well. One of the neighbors lives within 400 feet of a well located on an adjacent property and is often troubled by nosebleeds. The well draws gas from the ground and separates the water into a tank which vents every minute or so, emitting gas into the air. A national news crew ended up with sore throats and one asthma flare-up after only a few hours. This is an air pollution issue. Tr. 329-334.

Robert Helmacy, teaches part-time at Wilkes University and runs an organic fruit and vegetable farm. He has not leased his land because he is trying to grow healthy foods at home. His sister’s property was ruined by Atlas Company 20 years ago when they drilled on an adjacent property to hers, over 600 feet away. She cannot sell her property because of the polluted water. Two years

ago, he contacted his legislators to warn them that they needed additional legislation to regulate the industry, but he garnered little interest. Mr. Helmacy testified that the legislators have abrogated their responsibilities, and that citizens need to send them e-mails and letters and telephone calls to place a moratorium until the laws are in place to protect Pennsylvania. Tr. 334-337.

Jnaneshwar K. Johnson, employed by his father in an organic garden, agreed with the prior speakers. Tr. 338-444.

## V. DISCUSSION

### A. Legal standard for approval of an application for certification as a public utility

The parties all agree that Applicant bears the burden of proving its entitlement to certification by a preponderance of the evidence. The proponent of a rule or order in any Commission proceeding has the burden of proof, 66 Pa.C.S.A. § 332, and therefore, the Applicant has the burden of proving its entitlement to certification and must do so by a preponderance of the evidence, or evidence which is more convincing than the evidence presented by the other parties. *Se-Ling Hosiery v. Margulies*, 364 Pa. 45, 70 A.3d 854 (1950); *Samuel J. Lansberry, Inc. v. Pa. Publ. Util. Comm'n*, 578 A.2d 600 (Pa. Cmwlth. 1990).

Additionally, any finding of fact necessary to support an adjudication of the Commission must be based upon substantial evidence, which is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Mill v. Comm., Pa. Publ. Util. Comm'n*, 447 A.2d 1100 (Pa. Cmwlth. 1982); *Edan Transportation Corp. v. Pa. Publ. Util. Comm'n*, 623 A.2d 6 (Pa. Cmwlth. 1993), 2 Pa.C.S. § 704. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. V. Pa. Publ. Util. Comm'n*, 489 Pa. 109, 413 A.2d 1037 (1980); *Erie Resistor Corp. v. Unemployment Com. Bd. Of Review*, 166 A.2d 96 (Pa. Super. 1960); *Murphy v. Comm., Dept. of Public Welfare, White Haven Center*, 480 A.2d 382 (Pa. Cmwlth. 1984).

Before rendering public utility service, an entity is required to obtain a certificate of public convenience. 66 Pa.C.S.A. § 1101. A certificate of public convenience will be issued “only if the Commission shall find or determine that the granting of such certificate is necessary or proper for the service, accommodation, convenience, or safety of the public. . . .” 66 Pa.C.S.A. § 1103(a).

An applicant must meet the definition for “public utility” under the Public Utility Code, 66 Pa.C.S.A. § 102, and must be financially and technically fit to offer service.

The definition reads:

**§ 102. Definitions**

\* \* \*

“Public utility.”

(1) Any person or corporations now or hereafter owning or operating in this Commonwealth equipment or facilities for:

(i) Producing, generating, transmitting, distributing or furnishing natural or artificial gas, electricity, or steam for the production of light, heat, or power to or for the public for compensation.

\* \* \*

(v) Transporting or conveying natural or artificial gas, crude oil, gasoline, or petroleum products, materials for refrigeration, or oxygen or nitrogen, or other fluid substance, by pipeline or conduit, for the public for compensation.

\* \* \*

(2) The term does not include:

\* \* \*

(ii) Any producer of natural gas not engaged in distributing such gas directly to the public for compensation.

\* \* \*

66 Pa.C.S.A. § 102.

Applicant must prove that its actions fall within the definition of the term “public utility” as it appears in the Public Utility Code, and, if so, that it is technically and financially fit to be certificated.

A line of case law has developed for evaluating whether an entity is a public utility within the meaning of the Public Utility Code. The seminal case is *Drexelbrook Associates v. Pa. Publ. Util. Comm’n*, 418 Pa. 430, 212 A.2d 237 (1965) (“*Drexelbrook*”), in which Drexelbrook Associates sought to purchase the equipment from the electric and water companies already in place to serve a real estate development consisting of 1223 residential units, 9 retail stores, a club with a dining room, swimming pool, skating rink and tennis courts. The companies provided electric and water service directly to the tenants prior to the purchase. Afterwards, the companies would provide service to Drexelbrook, which would then bill the tenants, using the individual meters already in place to determine usage. The commission denied the application for transfer of equipment based on its belief that Drexelbrook would become a public utility and therefore, would need to apply for a certificate of public convenience.

The Supreme Court of Pennsylvania reversed the Commission, holding that the service that Drexelbrook intended to provide would not be “to or for the public” within the meaning of the statute. The public or private character of the enterprise does not depend upon the number of persons by whom it is used, but upon whether or not it is open to the use and service of all members of the public who may require it. *Drexelbrook* at 435, citing *Borough of Ambridge v. P.S.C.*, 108 Pa. Super. 298, 304, 165 At. 47, 49 (1933). Where the service was to an apartment house, the court held the service to be private in nature as it was limited to the tenants and incidental to the business of maintaining the apartment house. *Drexelbrook* at 435, citing *Aronimink Transp. Co. v. P.S.C.*, 111 Pa. Super. 414, 170 At. 375 (1934). In addition, “a public use . . . is not confined to privileged individuals, but is open to the indefinite public” and “it is this indefinite or unrestricted quality that gives it its public character.” *Drexelbrook* at 436, citing *Camp Wohelo, Inc. v. Novitiate of St. Isaac Jogues*, 36 Pa. P.U.C. 377 (1958).

The Commonwealth Court reads *Drexelbrook* as the Supreme Court’s determination of whether utility service is being offered “for the public” as “whether or not such

person holds himself out, expressly or impliedly, as engaged in the business of supplying his product or service to the public, as a class, or *to any limited portion of it*, as contradistinguished from holding himself out as serving or ready to serve only particular individuals.” *Waltman v. Pa. Publ. Util. Comm’n*, 596 A.2d 1221, 1223 (Pa. Cmwlth. 1990), citing *Drexelbrook* at 418 Pa. 435-436, 212 A.2d at 239.

Furthermore, the private or public character of a business does not depend upon the number of persons who actually use the service; rather, the proper characterization rests upon whether or not the service is available to all members of the public who may require the service. *C.E. Dunmire Gas Co., Inc. v. Pennsylvania Public Utility Commission*, 50 Pa. Commonwealth Ct. 600, 413 A.2d 473 (1980). The fact that only a limited number of persons may have occasion to use a utility’s service does not make it a private undertaking if the general public has a right to subscribe to such a service. *Masgai V. Pennsylvania Public Service Commission*, 124 Pa. Superior Ct. 370, 188 A. 599 (1936).; *Borough of Ambridge, supra*.  
*Waltman* at 50.

The Supreme Court of Pennsylvania clarified that a single customer is not “the public,” in its decision in *Bethlehem Steel Corporation v. Pa. Publ. Util. Comm’n*, 552 Pa. 134, 713 A.2d 1110 (1998), unless the reason for the single customer was the entity’s inability to secure other customers despite actively seeking additional customers to no avail. *See also Pilot Travel Centers LLC v. Pa. Publ. Util. Comm’n*, 933 A.2d 123 (Pa. Cmwlth. 2007).

With the advent of alternative energy projects and the prospect of questions arising regarding the status of those entities engaging in the provision of energy from alternative sources, the Commission issued a policy statement to provide guidance for the determination of public utility status. While the guidelines are aimed at the developers of alternative energy projects or systems, they are consistent with the case law cited above and provide an accurate method to evaluate whether a service is a public utility service:

**§ 69.1401. Guidelines for determining public utility status – statement of policy.**

\* \* \*

(c) *Fact based determination.* The Commission will consider the status of a utility project or service based on the specific facts of the project or service and will take into consideration the following criteria in formulating its decision:

(1) The service being provided by the utility project is merely incidental to nonutility business with the customers which creates a nexus between the provider and customer.

(2) The facility is designed and constructed only to serve a specific group of individuals or entities, and others cannot feasibly be serviced without a significant revision to the project.

(3) The service is provided to a single customer or to a defined, privileged and limited group when the provider reserves its right to select its customers by contractual arrangement so that no one among the public, outside of the selected group, is privileged to demand service, and resale of the service is prohibited, except to the extent that a building or facility owner/operator that manages the internal distribution system servicing the building or facility supplies electric and related electric power services to occupants of the building or facility. See 66 Pa. C.S. 102 and 2803 (relating to definitions).

\* \* \*

52 Pa.Code § 69.1401 (in pertinent part).

It is with the applicable law in mind that the Application is evaluated.

B. Effect of non-unanimous settlement on legal standard

In cases other than applications for certification of public convenience, the standard for review of a full settlement – one where all litigating parties have signed and agreed to settlement of all outstanding issues – is to evaluate whether the settlement is in the public interest. Where there are non-settling parties, the Applicant is held to the same burden of proof as it would have without any settlement.

However, in applications for public convenience, the applicant has to meet the requirements for granting the certificate whether or not there is a settlement. This makes sense, because the grant of the application is the basis for continuing Commission jurisdiction over the applying entity. While the Commission has the ability to determine whether it has jurisdiction, parties to a case cannot confer jurisdiction upon the Commission by agreement. In other words, if the Applicant does not meet the standard for certification as a public utility, thereby triggering Commission jurisdiction, the existence of an agreement among some, or even all, of the parties to this case will not confer jurisdiction upon the Commission. The application would be denied.

A non-unanimous settlement does not change the standard of legal review. Only the parties which have signed a settlement are bound by the terms to which they have agreed. In other words, the Applicant cannot promote a position other than that which it agreed to in the partial settlement, which places limits and conditions upon the grant of a certificate of public convenience. However, the non-settling parties have no limitations and are free to present evidence and argument against the positions taken by the settling parties.

Therefore, the existence of the Joint Petition for Settlement has no real effect on the Applicant's burden of proof except to limit its claims where there is a relevant clause in the Joint Petition. Applicant must prove its entitlement to the certificate of public convenience by satisfying each requirement.

## C. Analysis

### 1. Description of the service to be offered

The natural gas industry can be divided into four basic components: (1) exploration and production; (2) natural gas gathering, treating and processing, or "midstream" services; (3) natural gas transportation, or "downstream" services; and (4) local distribution services, or traditional state regulated public utility service. *PIOGA MB* at 4, citing *LLM St. 1* at 3, 5 and 7. The function under discussion here is (2) natural gas gathering or midstream services.

A midstream company transports “raw” gas, which has not been separated from contaminants which preclude it from use by the local distribution companies. These contaminants must be removed before the gas can be transported in transmission pipelines or consumed by end-users. PIOGA MB at 5, citing LMM St. 1 at 7.

Applicant proposes to construct a natural gas gathering and transportation pipeline in Susquehanna County, in the named townships, which will collect gas from the well heads of the producers and deliver it to a pipeline for further transportation to New York. Applicant’s primary business purpose is to grow with the development of the Marcellus Shale, and to serve as many producers as possible. Laser MB at 18-19.

2. Parties to the Non-Unanimous Joint Petition for Settlement

In addition to Applicant, the non-unanimous Joint Petition for Settlement was signed by Silver Lake Association, OTS, Mr. Fischer and Ms. Scroggins.

Silver Lake Association believes that the conditions agreed to in the Joint Petition will yield the best result for its members and for the people of Pennsylvania. Silver Lake asserts that the definition of “public utility” applies here because Applicant had three customers, which were gas production companies, by May 2010, and had expressed its willingness to serve additional producer customers subject to its tariff. Silver Lake MB at 9. More importantly, from Silver Lakes’ view, is:

By finding Laser to be a public utility, the Commission will rightly claim the authority to regulate this enterprise which will have a profound impact on the quality of life of the residents of Susquehanna County.

Silver Lake MB at 9.

Silver Lake promotes adoption of the Joint Petition because:

- It strikes a balance between private and public concerns;

- The residents of Pennsylvania will benefit substantially from the enhanced safety protections which will reduce the risk of dangerous pipeline accidents;
- Property owners whose land may be crossed by the pipeline project have added protections which increase the likelihood that a satisfactory resolution can be achieved without resort to eminent domain proceedings;
- Property owners will enjoy a host of additional protections and best practices;
- An assessment against the Applicant will facilitate regulation;
- It will provide for Commission authority over a major pipeline in the newly developing Marcellus industry while addressing the primary concerns of several public interest parties to the proceeding;
- It provides a resolution which is in the public interest.

Silver Lake MB at 13-14.

In other words, because the public interest is well served by the terms of the non-unanimous Settlement, the Application should be granted. The parties point out that the Commission may grant a CPC only if “the granting of such certificate is necessary or proper for the service, accommodation, convenience, or safety of the public.” 66 Pa.C.S.A. § 1103(a). In addition,

. . . the controlling and paramount factor in granting a certificate of public convenience and necessity *to a utility* is the public interest. The primary objective of the Public Utility Code is not to establish a monopoly or to guarantee the security of investment in public utilities, but first, and at all times, to serve the interest of the public. The Commission can only properly base its Order on the interests of the public, as distinguished from the utility’s interest. *In re Apollo Gas Co.*, 67 Pa. P.U.C. 586, 588, 1988 Pa. PUC LEXIS 426 at 5-6 (1988) (citation omitted), *rev’d on other grounds sub nom. Peoples Natural Gas Co. v. Pa. PUC*, 124 Pa. Commw. 59, 555 A.2d 288 (1989).

Scroggins MB at 16-17 (emphasis added).

However, a finding that the service offered under the non-unanimous settlement is in the public interest does not mean that the service offered is public utility service. The determination of whether it is public utility service within the meaning of the Public Utility Code cannot be established by agreement.

OTS argues that the service to be offered by Applicant falls squarely within the definition of public utility because the service is “to or for the public.” OTS MB at 9-15. The OTS approach is to view “for the public” as including the producers, i.e., the entities with wells on their property, as “the public,” and therefore, the service benefits them and justifies a CPC. As support, OTS cites *UGI Utilities, Inc. v. Pa. PUC*, 684 A.2d 225 (1996)(“UGI”), for the proposition that “for the public” in the context of an application for a CPC is whether or not the Applicant holds itself out as engaged in supplying the product or service to the public as a class, or to any limited portion of it, as contradistinguished from holding itself out as serving or ready to serve only particular individuals. *UGI* at 1223-1224.

An additional factor is whether the facility was designed and constructed only to serve specific individuals so that the resulting service is not properly considered to be for the public. OTS MB at 13, citing *UGI* at 229. Here is where the OTS argument fails. A gathering line is specifically designed to serve the *producers* at the particular locations where the wells are built and to transport the gas to a designated transmission line and ultimately to a refinement facility. This is a business transaction and is the very definition of “constructed only to serve specific individuals.” Note the sharp contrasts between gathering raw gas for transport to a refining facility and the actions of a traditional gas utility, which installs its distribution lines in a manner which permits property owners all along the route to connect to consume gas in operating their heating and cooking appliances.

Neither can “for the public” be interpreted as “for the end users who can eventually purchase this gas after it has been transported to the necessary refinement facilities and transported back to the NGDCs.” Followed to its logical conclusion, it would include just about every aspect of removing gas from the ground and transporting it to the NGDCs. The well drillers, the property owners, the gas storage facilities, the plant where the raw gas is refined,

even the manufacturer of the gas appliances – all would be “for the public,” because members of the public use the finished product. The “public utility” designation was not intended to be so broad.

Protestant Scroggins agrees with the legal standard applicable and avers that Laser meets it: (1) Laser’s only business is the construction and operation of pipelines, with no non-utility business for which this is “merely incidental”; (2) Laser’s pipeline is not being designed and constructed only to serve a specific group of individuals or entities such that others cannot feasibly be served without a significant revision to the project; and (3) Laser is not seeking to provide its services to a single customer or to a defined, privileged and limited group.

In fact, the pipeline is being designed and constructed to serve a specific group: those gas producers who need a method to take the raw gas to refinement and market. While the pipeline may be constructed to accommodate additional connections (for more producers), those connections will have to be built to serve each producer. Provision of services will be to that group defined as producers, and the majority of the entities and individuals in the Commonwealth will never qualify as members. “Producers” is limited to those who own a substantial piece of property located in the Marcellus Shale region where the necessary zoning limitations and environmental and other applicable requirements will permit drilling, and a well is located. This is a clear example of “privileged.”

The signatories to the non-unanimous Settlement emphasize that the public safety concerns for the gas industry in the Marcellus Shale area are great, and that the conditions appearing in the non-unanimous Settlement will result in service that protects the public interest, and therefore, the non-unanimous Settlement should be approved. The protestants aver that the Commission should not grant a CPC *unless* the conditions agreed to in the non-unanimous Settlement are also imposed.

Unless the Commission approves the conditions proposed in the Joint Petition, Laser cannot provide service in the public interest and is not entitled to a Certificate. Approving the conditions will fill gaps in pipeline regulation – which does not yet

adequately address safety and siting issues – and address the legitimate concerns regarding health, safety and the environment raised by the Protestants and the public in the course of this proceeding. Because those concerns will not be addressed in the absence of the conditions, the conditions are essential to protect the public interest and therefore are “just and reasonable.”

Scroggins MB at 18.

This illustrates the weakness in the non-unanimous Settlement itself. The Protestants are very – justifiably – concerned with the safety of the natural gas operations in their area, and seek to use this Application to further their causes:

To provide service in a manner that protects the public interest, Laser must construct and operate the Pipeline in a manner that minimizes the serious safety risks posed by high-pressure transportation of natural gas. Neither federal nor Pennsylvania law regulates even 16-inch gathering lines, when they are laid in the least populated rural areas. Moreover, unless the Proposed Settlement is approved, Laser will provide service only to the minimum extent required by law. (Laser No. 2-R at 3, 5; Laser No. 40R at 2-3.) Therefore, the only way that the Commission can ensure that Laser’s service will protect the public interest is to include in Laser’s Certificate the safety conditions set forth in the Joint Petition, Section H, ¶¶ 1-5 and 9-14.

The safety conditions in the Proposed Settlement directly respond to the concerns raised in testimony. They require Laser to design, construct, and operate the Pipeline in a safe and responsible manner, as if it qualified as a Type A regulated gathering line under 49 C.F.R. Part 192, even when it runs through Class 1 areas and otherwise would be unregulated. (Jt. Pet., Section II, ¶ 1.) . . . . Only with these conditions can the Certificate protect public safety and serve the public interest.

Scroggins MB at 19-20.

In other words, Applicant has bargained for its CPC by agreeing to comply with safety conditions that the Commission would not otherwise have jurisdiction to enforce. Protestants believe that, because the public interest is better served with Commission jurisdiction over safety than without it, the Commission should take the deal.

### 3. Non- Signatory Parties

Intervenors MarkWest Liberty Midstream & Resources, LLC, Superior Appalachian Pipeline, LLC, Laurel Mountain Midstream, LLC, and PIOGA argue that the Application should be denied because the service offered is not public utility service within the meaning of the Public Utility Code, 66 Pa.C.S.A. § 102 (definitions).

Intervenor DTE Pipeline Company and Bluestone Pipeline Company of Pennsylvania, LLC (DTE), takes a slightly different approach. While DTE agrees that the Joint Petition for Settlement contains a number of conditions which are not appropriate for inclusion in the issuance of a certificate of public convenience, it recommends disapproving the *conditions* – not the issuance of a certificate. DTE supports the issuance of a certificate of public convenience for those gathering companies that will provide services to the public, but recommends “light-handed” regulation, i.e., without regulation of rates, and no Commission oversight for the siting of lines. DTE MB at 14.

The key language in the Public Utility Code is that the service to be offered must be offered “to or for the public for compensation.” In addition, the term does not include “any producer of natural gas not engaged in distributing such gas directly to the public for compensation.” 66 Pa.C.S.A. § 102 (definition of public utility). The Commission’s standard addressing public utility status has three prongs, *see* “Legal Standard” section of Discussion, *supra*, 52 Pa.Code § 69.140, and LMM and MarkWest aver that the third prong is not met because natural gas gatherers serve a defined, privileged and limited group. MarkWest MB at 9; Laurel Mtn. Midstream MB at 2:

Laser and the other parties to the non-unanimous Settlement cite to several cases in which Pennsylvania courts have concluded a company was a public utility because it provided service to “commercial users,” Laser MB at 14 (citing *Bethlehem Steel Corp. v. Pa. PUC*, 680 A.2d 1203, 1206 (Pa. Cmwlth. 1996), “individual commercial entities and other common carriers,” including “large volume customers,” Laser MB at 14-15 (citing *Waltman v. Pa. PUC*, 596 A.2d 1221 (Pa. Cmwlth. 1991)), and to electric power plants, Laser MB at 15-16 (citing *UGI Utilities, Inc.*

*v. Pa. PUC*, 684 A.2d 225 (Pa. Cmwlth. 1996)). In not one of these cases, however, did a court determine that an entity providing service “upstream” to natural gas producers, consisting of the transportation of natural gas that is not even fit for interstate transmission or end-use, from the well head to an interstate transmission pipeline for delivery to parts unknown, qualifies as a Pennsylvania “public utility.”

Laurel Mt. Midstream RB at 3.

The product transported by a traditional natural gas utility has already been processed, compressed and dehydrated into natural gas of a uniform grade suitable for local distribution. MarkWest St. 1 at 10; LMM St. 1 at 7, 11; LMM RB at 5. The raw gas transported by gathering lines is contaminated with water, heavy hydrocarbons and other contaminants which must be removed before it can be delivered to the end user. It *cannot* be used “by the public” until it has been treated.

The parties have identified two instances in which the Commission has granted a certificate of public convenience to a natural gas gathering line operator. In *Application of Allegheny Land and Exploration, Inc. for approval of the right to offer, render, furnish or supply gas transporting or conveying service by pipeline to the public in Glade and Meade Townships, Warren County, Pennsylvania*, Docket No. A-125136 (Order entered March 7, 2005)(“*Allegheny Land*”), the Commission granted a CPC to Allegheny for a 4.2 mile gathering line which would transport gas from natural gas producers to a stripping or fractionation plant owned by the operator’s parent. The Commission granted Allegheny’s request to expand its authority at Docket No. A-2008-2029743 (Order entered October 14, 2008).

In *Allegheny Land*, the application was granted pursuant to an agreement between the applicant and one intervenor which quoted the stipulation as follows:

5. The purpose of Allegheny’s Application is to receive approval from the Commission to transport low quality, high Btu natural gas for natural gas producers to a Stripping/Fractionating Plant located in Meade Township, Warren County, Pennsylvania, that is owned by Allegheny’s parent company, PAPCO, Inc.

6. Allegheny is not seeking approval from the Commission to transport gas to the public for consumption.

7. The public customers that Allegheny will serve in Warren County, Pennsylvania, are natural gas producers.

*Allegheny Land*, at 3, noting that the intervenor, National Fuel Gas Distribution Corporation, agreed to not assume an active role due to this stipulation. The Commission granted the application based on a finding that the stipulation was in the public interest under *City of York v. Pa. P.U.C.*, 449 Pa. 136, 295 A.2d 825 (1972), and not upon an analysis of whether the applicant met the standard for a public utility.

The second is *Application of Ardent Resources, Inc. for approval of the right to offer, render, furnish or supply natural gas transporting or conveying service by pipeline to the public in Jordan and Chest Townships, Clearfield County, Pennsylvania*, Docket No. A-140005 (Order entered April 16, 2007) (“*Ardent*”), where the CPC was rescinded upon request of the applicant, (Order entered April 17, 2009), because Ardent was the pipeline operator and the pipeline was owned by another company, which agreed to limit its service “to an extremely narrow, limited group of affiliated natural gas producers, not to the public.” (Order of April 27, 2009 at 6).

Neither *Allegheny Land* nor *Ardent* was subject to appellate review, and therefore, the standard set forth in *Drexelbrook*, adopted in the Commission’s policy statement, is still the applicable law.

More on point is a proceeding disposing of a petition for a declaratory order that it was not a public utility, *Nutmeg Energy, Inc., Gas City Oil and Gas Corporation, Exley Oil and Gas Corporation* at Docket No. P-00062204 (*Nutmeg Energy*). Nutmeg was required to build a gathering pipeline approximately four miles long and to acquire easements from property owners over whose land the gathering pipeline would traverse to reach the facilities of PPL Gas Utilities, Inc.

Twenty-five property owners are affected by this gathering line. *Five* presently receive or recently received natural gas from both Columbia and Nutmeg by means of a dual-feed system. *Six* are presently receiving natural gas service from Columbia and have an easement agreement or mineral lease with Nutmeg but are not currently receiving service from Nutmeg and do not have a dual-feed system allowing service from both Columbia or Nutmeg. *Five* have an agreement or mineral lease with Nutmeg but are currently not receiving natural gas service from Columbia or Nutmeg. *Four* have an easement agreement or mineral lease with Nutmeg, but a Nutmeg pipeline is not yet installed to serve them. *One* has a Nutmeg pipeline already installed and an easement agreement was in the process of being finalized. *One* has an easement agreement with Nutmeg and is currently receiving natural gas from Nutmeg. *Two* have mineral leases with Nutmeg and are presently receiving natural gas service from Nutmeg. *One* has partial ownership of one of Nutmeg's wells and is presently receiving natural gas from Nutmeg.

\* \* \*

Consequently, Nutmeg has committed (1) not to hold itself out to the public as providing natural gas service; (2) not to offer natural gas service in exchange for easements except under very limited circumstances which it must explain to Columbia (which doubtless stands ready to enforce the settlement agreement); and (3) not to offer natural gas service to any entity other than those with whom it has an easement agreement or mineral lease.

\* \* \*

The OTS correctly concluded that, based upon the limited facts and circumstances contained in Nutmeg's petition, provision of natural gas service by Nutmeg to a limited number of property owners providing easements or mineral leases for a gathering pipeline does not constitute the provision of public utility service as defined by 66 Pa.C.S. § 102, but that any provision of service by Nutmeg outside the defined, privileged and limited group of twenty-five customers could conceivably constitute service "to or for the public."

\* \* \*

**The important consideration is the ability to select and control who will be served through contractual arrangements or otherwise.**

Nutmeg's natural gas service is not open to the use and service of all members of the public who may require it, but only to those with whom it has contracted in order to obtain essential easements to construct a gathering pipeline to transport natural gas to PPL for sale at wholesale.

*Nutmeg Energy* at 2-9 (Order entered February 26, 2007).

Nutmeg's "customer base" would be limited to those property owners whose property it needed to cross with its gathering lines, and that limitation was determined to push the operations outside the scope of "to or for the public." Here, the customer base is limited to those property owners and/or well owners or operators with natural gas to move elsewhere for sale. There are no individuals consumers of the commodity itself. Transporting gas from a producer to market is a business transaction, not public utility service.

It is important to note that in *Nutmeg Energy*, the Commission was considering whether Nutmeg's provision of natural gas service to those property owners over whose property the gathering lines traversed amounted to service "to or for the public" within the meaning of the Public Utility Code. The majority opinion did not discuss whether the provision of the gathering lines themselves constituted public utility service, but in the dissent, Commissioner Holland expressed his concern that Nutmeg was not subject to enforcement of safety regulations regarding its gathering lines from which service to the property owner/customers was provided. The concern was centered on safety for service to the property owner/customers. The Commission had squarely faced a situation where a gathering company sought a determination regarding its public utility status and had decided that the gathering service, even with residential customers along its route, did not meet the definition of "public utility."

MarkWest Witness Sanders stated:

I am not familiar with the circumstances in which an operator could qualify as a public utility by providing open service to producers or manufacturers, but not provide service directly to the end-user. It is noteworthy that the Commission's definition of public utility expressly refers to the public, while producers and manufacturers are treated as different entities, being explicitly

exempted from the provision unless they are providing direct service to the public. There are clear requirements established for those production or transmission lines that provide service to the public.

MarkWest Stmt. 1 at 13.

In the present case, where there are no consumers from the gathering lines, there is an even weaker argument that a gathering service meets the statutory definition for “public utility.”

The Commission’s actions in the determination of whether an applicant meets the definition of “public utility” have been inconsistent, and Laurel Mountain Midstream addresses the inconsistencies as follows:

However, the *Allegheny Land* Orders and the rescinded *Ardent* Order are aberrations and do not reflect the state of Pennsylvania law as described above. They include no analysis or determination of whether upstream producers can constitute “a class open to the indefinite public.” *Drexelbrook Associates*, 418 Pa. at 436, 212 A.2d at 240. Rather, they simply assume it. Neither *Allegheny Land* nor *Ardent* held themselves out as offering service to burner-tip customers or any other class open to the indefinite public at large. Like other gatherers such as LMM, *Allegheny Land* and *Ardent* appeared to be private companies serving other private companies. They are not impressed with a public interest.

Further, unlike the instant Application, the *Allegheny Land* and *Ardent* applications were not contested, and their disposition did not involve nearly the degree of analysis that this proceeding will entail. Indeed, the Commission’s Order in *Allegheny Land* does not include any analysis of the definition of “public utility” under Section 102 or any of the seminal cases which interpret “for the public,” several of which are discussed [sic] above. Instead, the *Allegheny Land* order approves the application using the “affirmative public benefits” analysis of *City of York v. Pa PUC*, 449 Pa. 136, 295 A.2d 825, (1972), a standard typically associated with public utility mergers.

LMM MB at 15-16.

MarkWest testified that gathering lines should not be considered a public utility under the current Pennsylvania legal framework:

There does not seem to be any regulatory justification to support for regulation of gatherers in general, and it could set a dangerous precedent when considering issues relating to the development of the Marcellus Shale. I would also question what exact responsibilities or burdens are required of any gathering operator who is determined to be a public utility. Current Pennsylvania law and regulation is not written to address the financial concepts and/or issues associated with operating natural gas gathering lines. Being labeled a “public utility” comes with certain rights, but also responsibilities. Gathering operators should not generally be determined to be utilities unless clear responsibilities and requirements are established through an appropriate policy development process that has been vetted and scrutinized, either through legislation and/or regulation.

MarkWest Stmt. 1 at 12.

As the Commission stated in *Nutmeg Energy*, the important consideration is the ability to select and control who will be served through contractual arrangements or otherwise. The Applicant has that ability and will make the determinations based on operational considerations, i.e., location, ease of service, etc. The services described in the Application do not meet the definition of “public utility” within the meaning of the Public Utility Code.

The OCA did not sign the non-unanimous Joint Petition for Settlement but takes a slightly different approach than the other parties.

The OCA submits, however, that the Commission’s decision in this case will have far-reaching implications and that the Commission’s Order in this case, as opposed to the parties’ agreement, will have and should have significant precedential value. This case cannot be decided in a vacuum. The determination of whether or not Marcellus Shale gathering service providers must seek public utility status cannot be in the hands of each individual business entity, but must be decided by the Commission.

\* \* \*

This is the first litigated case before the Commission dealing with significant Marcellus Shale gas production and transportation. Although some industry participants have become actively involved in this proceeding, there are others that have not. In addition to deciding the specific case before it, the OCA, therefore, recommends that the Commission establish guidelines setting forth specific criteria that the Commission will apply in determining public utility status for Marcellus Shale gathering service providers in the future. The Commission could set forth the criteria through a Tentative Order or as an amendment to its existing Policy Statement regarding the determination of public utility status. 52 Pa. Code § 69.1401. By taking such action, entities and individuals with an interest in the criteria that will be used by the Commission in making these determinations in the future will be afforded the ability to weigh in with their positions.

OCA MB at 5-7 (citations omitted).

The OCA is correct that this case will influence future determinations regarding whether an entity should receive a certificate of public convenience, but a tentative order is not the correct vehicle to establish guidelines and filing requirements. An order would have binding effect only on those parties to it and would merely be advisory to any other entity. Rather, there must be legislative action to enable whatever level of certification is deemed to be necessary by the Pennsylvania legislature. Then, the requirements that the Commission chooses to carry out the legislation should be issued in a notice of proposed rulemaking, followed by a final rulemaking. This will ensure that all interested entities can weigh in, which addresses the OCA's concern, *and* any entity seeking Commission rules in the future can find them easily in the Commission regulations.<sup>3</sup> Regulations are enforceable, as well.

An administrative agency has available two methods for formulating policy that will have the force of law. An agency may establish binding policy through rulemaking procedures by which it promulgates substantive rules, or through adjudications which constitute binding precedents. A general statement of policy is the outcome of neither a rulemaking nor an adjudication; it is neither a rule nor a precedent but is merely an announcement to the public

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<sup>3</sup> The goal of this action is to create regulation, which is defined as “any rule, regulation or order in the nature of a rule or regulation, of general application and future effect, promulgated by an agency under statutory authority in the administration of any statute administered by or relating to the agency, or prescribing the practice or procedure before such agency.” 2 Pa. C.S. 101. (Administrative Agency Law).

of the policy which the agency hopes to implement in future rulemakings or adjudications. . . .

The critical distinction between a substantive rule and a general statement of policy is the different practical effect that these two types of pronouncements have in subsequent administrative proceedings. . . . A properly adopted substantive rule establishes a standard of conduct which has the force of law . . . . The underlying policy embodied in the rule is not generally subject to challenge before the agency.

A general statement of policy, on the other hand, does not establish a ‘binding norm’ . . . . A policy statement announces the agency’s tentative intentions for the future. When the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued” *Pennsylvania Human Relations Commission v. Norristown Area School District*, 473 Pa. 334, 346-350, 374 A.2d 671, 677-679 (1977).

*Bethlehem Area School District v. Zhou*, 976 A.2d 1284, 1288 (Pa. Cmwlth. Ct. 2009)

Without legislation, the Commission cannot find that this Applicant is entitled to a CPC.

4. Imposition of conditions

The non-unanimous Joint Petition for Settlement contains the following conditions:

**Operations and Safety**

1. The pipeline will be designed, constructed, and operated as if it qualified as a Type A regulated onshore gathering line operating in a Class 2 location under the provisions of 49 CFR part 192 even though portions of the system otherwise would not be subject to such requirements. In the event the pipeline passes through a class 3 or 4 location the more stringent class 3 or 4 requirements of 49 CRF [sic] Part 192 shall be applicable.

Any feeder gathering lines 6 inches or less will be subject to the requirements of 49 CFR Part 192.

2. The Company will register all lines with PA One-Call, and will provide to the appropriate division of the Commission, copies of the maps utilized in conjunction with the PA One-Call program.
3. The pipeline will be reasonably marked with warning signs, and the Company will provide specifics to the PUC's gas safety division as to what constitutes reasonable marking with warning signs that are ordinarily used by the industry. Such notices shall conform with 49 CFR Part 192.707.
4. The Company will utilize proven high quality and industry standard pipe material, materials and equipment for the pipelines, and welding and inspection techniques including any applicable by law or regulation including those in 49 CFR.
  - a. 100% of welds will be x-rayed for the pipeline.
5. While there are no present plans for compressors in Pennsylvania, if any are installed, they will comply with all laws including environmental (including emissions).
  - a. The Company will use natural gas as opposed to diesel compressors.
  - b. The Company will employ gas capture and vapor-recovery technologies that meet lawful applicable laws or regulations, including any lawfully applicable environmental laws or regulations.
  - c. The Company will employ appropriate measures, including but not limited to, proximity or location, to limit any reverberant and break-out noise from compressor stations. Such measures shall consider the population and proximity

thereto. The Company will comply with any lawful noise standards that are applicable.

### **Eminent Domain**

6. Eminent Domain is a process the Company would use only as matter of last resort after all other reasonable options (including re-routing) are not feasible.
  - a. The Company agrees to exhaust all reasonable efforts to negotiate a good-faith resolution with the landowner involved before exercising eminent domain.
  - b. The Company will file a letter at least 30 days in advance of commencing the subject eminent domain action with the PUC Secretary notifying the Commission of any planned condemnation action, and the reason why it is being pursued.
  - c. The Company will not condemn property where the resulting easement would require the abandonment or destruction of existing structures, mobile homes, lakes and ponds. Structures that are not inhabited by humans and less than 100 square feet shall not be included in this restriction.
  - d. The Company shall provide prompt written notice to the landowner of its belief that negotiations for an easement have reached an impasse, and of the landowner's right to request timely mediation through the PUC prior to the Company's initiation of the eminent domain process. The Company will, upon written request of a landowner, participate in a non-binding PUC Mediation procedure, to be commenced at least 30 days before exercising any eminent domain right. The mediation process shall take no more than 30 days unless otherwise agreed by the parties to the mediation. The receipt of notice by the landowner will mark the beginning of the 30-day period.

## **Landowner Issues**

7. Without admission or concession as to the Company's position regarding a lack of Commission jurisdiction over certain or all of the following terms, and mindful of public input comments or testimony, the parties to this Joint Petition for Settlement, after much negotiation, consideration, and give and take, agree, subject to the Commission's approval, to the following landowner protections and easement terms 8-32 which will apply to any easement for the pipeline or any related facilities, including but not limited to any feeder or lateral lines that may be developed under Laser's Certificate of Public Convenience, which are entered into on or after August 23, 2010.

(Paragraphs 8-32, which are marked "Highly Confidential" and are not included here, contain the responsibilities of the parties to an easement)

## **Assessments**

33. The Company agrees with OTS that it should be subject to assessments, provided they are determined in accordance with applicable law.

## **Fact Specific Determination**

34. The Settling Parties agree that Laser shall be certificated as a public utility transporting or conveying natural gas for customers for compensation, and that such determination shall not constitute precedent for any other gatherer with different facts, who hold themselves out differently, operates differently, or serves, or may serve a different territory than sought by Laser.
35. The Settling Parties agree or do not oppose the stipulation by ETC NE and Laser that Laser is not seeking an exclusive franchise for the Townships that are the subject of this application, and that Laser's service will occur via contract and its tariff.

36. The Settling Parties agree or do not oppose Laser's request for light-handed regulation as proposed by Laser in its application and testimony: (1) negotiated rates like natural gas transportation with maximum rate or LDC gas alternate/competitive energy tariffs (*see e.g.*, Columbia Gas of Pennsylvania, Inc. negotiated contract rates for customers under Tariff No. 144 to Tariff Gas-Pa. PUC No. 9 Fifth Revised pages 115 and 116); (2) no affiliated interest or security certificate filings; (3) reasonably expedited Section 1102 proceedings for commencement, transfer or abandonment; safety regulation applies including any new amendments to the Statute or any new law; complaint forum remains effective; and (4) streamlined annual reporting to be developed.

### **Standard Settlement Terms**

37. The Settling Parties can withdraw from the Settlement if the PUC attaches other conditions or modifications to this Settlement or the certificate of public convenience.
38. This Settlement is subject to standard settlement terms, including, that for the Settling Parties, it is without admission, without prejudice if not accepted by the Commission, that the Settling Parties can withdraw if it is modified or rejected by the Commission, and that it cannot be used against any party in any different proceeding except for compliance matters or to implement this Joint Petition for Settlement. Any election to withdraw must be made in writing, filed with the Secretary of the Commission and served upon the Settling Parties hereto within five (5) business days after the entry of an order modifying this Joint Petition for Settlement. It is understood and agreed among the Settling Parties hereto that this Joint Petition for Settlement is the result of compromise.
39. The Settling Parties agree to waive cross-examination of each other, and do not oppose the introduction of their testimony and associated exhibits into the record.
40. Stipulation terms 1-5 and 6-32 shall be conditions to Laser's certificate. Laser's agreement to such terms shall not be construed as evidence or an admission that the Commission has jurisdiction over any of the subjects of these such terms but rather than

it is willing, as a compromise, to honor those conditions in exercising its certificate rights and providing service as described in its testimony and exhibits. Laser agrees not to assert a lack of jurisdiction in any compliance matter before this Commission to enforce said conditions.

## **Tariff**

41. The Settling Parties agree not to oppose Laser's initial tariff filing provided it is consistent with that attached to the Application and Laser's direct testimony.

\* \* \*

Joint Petition for Settlement, pp. 10-17 (citations omitted).

The problems with this non-unanimous Settlement are numerous: many are non-jurisdictional and therefore, not enforceable; the terms used are vague and not defined, therefore subject to wide interpretation; and, there is no support in the existing law for "light-handed regulation"

### 5. Non-jurisdictional Conditions

Applicant recognizes that the Commission has no jurisdiction over environmental issues:

Laser Northeast has worked closely with the representatives of the Pennsylvania Department of Environmental Protection ("DEP") in preparing and filing applications for permits that address several of the concerns identified in Ms. Scroggins' direct testimony. Our understanding is that DEP is the agency with authority over the environmental issues identified in Ms. Scroggins' direct testimony. It is also our understanding that the Commission has no authority over these environmental issues which are under the jurisdiction of the DEP.

LNG Stmt. 5-R at 2.

LMM argues against imposition of the conditions appearing in the non-unanimous Settlement because they include those for which the Commission has no jurisdiction, therefore, no ability to enforce. LMM RB at 6. “It is well-settled that the Commission does not have jurisdiction over compliance with either federal or Commonwealth environmental laws. *Pickford v. Pa. PUC*, No. 1156 C.D. 2009, 2010 WL 3447770, \*4-6 (Pa. Cmwlth June 29, 2010); *Country Place Waste Treatment Co. Pa. PUC*, 654 A.2d 72, 75-76 (Pa. Cmwlth. 1995); *Rovin v. Pa. PUC*, 502 A.2d 785, 787 (Pa. Cmwlth. 1986).” LMM RB at 7.

It is well settled that the Commission may not exceed its jurisdiction and must act within it. *City of Pittsburgh v. PA PUC*, 43 A.2d 348 (Pa. Super. 1945). Subject matter jurisdiction is a prerequisite to the exercise of the power to decide a controversy. *Hughes v. Pa. State Police*, 619 A.2d 390 (Pa. Cmwlth. 1992). As a creature of legislation, the Commission possesses only the authority the General Assembly has specifically granted to it in the Code. 66 Pa.C.S. §§ 101-3316. Its jurisdiction must arise from the express language of the pertinent enabling legislation or by strong and necessary implication there from. *Feingold v. Bell*, 477 Pa. 1, 383 A.2d 791 (1977). Most importantly for this proceeding, jurisdiction may not be conferred by the parties where none exists. *Roberts v. Martorano*, 427 Pa. 581, 235 A.2d 602 (1967). Neither silence nor agreement of the parties will confer jurisdiction where it otherwise would not exist. *Commonwealth v. VanBuskirk*, 449 A.2d 621 (Pa. Super. 1982).

LMM MB at 24-25.

As Laurel Mountain points out, the agreement cannot confer jurisdiction where there is none. LMM MB at 25. *See also* DTE MB at 15:

More specifically, the Pennsylvania appellate courts have held specifically that the Commission’s subject matter jurisdiction may not be expanded through the imposition of conditions on the issuance of a certificate of public convenience, as the Settlement contemplates in this proceeding. In *Western Pennsylvania Water Co. v. Pa. P.U.C.*, 471 Pa. 347, 370 A.2d 337 (1977)(“*Western Pennsylvania Water Co.*”), the Supreme Court explained that administrative agencies are creatures of the legislature and have only those powers which have been conferred by statute. Moreover, an administrative agency cannot by mere contrary usage

acquire a power not conferred by its organic statutes. Nor can an administrative agency acquire subject matter jurisdiction by agreement.

DTE MB at 15.

Silver Lake explains the conditions regarding eminent domain as leaving the function of the Eminent Domain Code intact but merely creating “an obligation for the Applicant to demonstrate its claim that it will use eminent domain as a last resort after exhausting good faith efforts to negotiate an easement with landowners.” Silver Lake RB at 6. This, Silver Lake explains, would not require formal or even informal determinations by the Commission.

Plainly, non-binding mediation conducted by staff, with no determination made, is no exercise of jurisdiction over eminent domain, as the term is understood by the Business Corporation Law of 1988. The Joint Petition’s condition regarding eminent domain does not justify the intervenors’ claim of jurisdictional overreach.

Silver Lake RB at 7.

On the contrary, it fully supports a claim of jurisdictional overreach. What it does not do is create a condition which is enforceable. There is no forum which has jurisdiction over the enforcement of this condition. A court of common pleas may decline to rule because the condition is to a certificate of public convenience issued by this Commission. This Commission cannot decide when a gas utility has exhausted its methods of negotiation and has no alternatives to eminent domain. Hence, this “condition” is meaningless.

OTS argues that the presence of conditions which cannot be enforced by the Commission should not serve as the basis for rejection of the non-unanimous settlement. OTS agrees that “approval of the settlement does not necessarily empower the Commission [to] resolve disputes outside of its jurisdiction. . . . OTS submits that, to the extent the Commission lacks jurisdiction over any issues addressed in the Joint Petition, such jurisdiction is not required to enforce the settlement terms.” OTS RB at 16. OTS then argues that portions of the settlement would fall under the jurisdiction of other state and federal agencies, as well as civil courts.

The jurisdictional concerns expressed by the opposing parties conflict with the language of the Settlement terms. The Settlement terms do not require the Commission to engage in declarations of law or adjudications of private rights and therefore does not purport to confer jurisdiction where none exists. A court exercises jurisdiction when it decides a controversy and declares the law. Approval of the Joint Petition does not constitute a declaration of law as the terms and conditions therein would not bind any entity beyond Laser. Although the OCA has requested that the Commission issue such a declaration of a law, this is not the request of the Joint Petitioners and should not transform a settlement into a regulatory edict.

OTS RB at 17 (citations omitted).

Yet a CPC is, in fact, a regulatory edict. It is the Commission's statement that it has examined the application and determined that the proposed service falls within the definition of public utility service, and the applicant has proven that it is entitled to the rights, responsibilities and protections which are intrinsic to that designation. It makes no sense to grant such a powerful regulatory edict (CPC with all of its rights) under conditions which the Commission is then powerless to enforce.<sup>4</sup> After all, either the service is public utility service or it is not. Reasonable conditions may be imposed when a CPC is granted, but the imposition of conditions, jurisdictional or not, which make the grant of a CPC more palatable will not transform the service into public utility service if the service did not fit the definition before those conditions were imposed.

While the attempt of the signatories to the non-unanimous Settlement to enforce conditions which will admittedly result in best practices from the Company is laudable, the non-unanimous Settlement will not accomplish this purpose.

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<sup>4</sup> While Applicant has agreed not to challenge jurisdiction in compliance matters, ¶ 40, it makes no sense to approve a settlement which creates a situation where the Applicant's agreement to not challenge jurisdiction is itself not enforceable. Keep in mind, too, that *not challenging* jurisdiction where none exists does not create it.

Protestant Scroggins states:

By approving the proposed settlement of this case (the “Proposed Settlement”), the Public Utility Commission (the “Commission” or “PUC”) can ensure that if Laser builds a gathering line system capable of serving up to 500 wells (Laser No. 1, Ex. E, at 7), in predominantly Class 1 areas (SLA No. 1a at 6; Tr. 391), the Commission will have the authority to promote public safety and a health environment along the entire pipeline route.

Scroggins MB at 1.

It is important to note that the non-unanimous settlement does not and cannot confer jurisdiction by agreement where none exists without the agreement. Note, too, that the Applicant is aware of the limits of Commission jurisdiction:

First, it is my understanding that the Commission does not regulate the pricing of easements and instead that is covered by the terms of the Business Corporation law and the Eminent Domain Code that the Legislature enacted for that purpose. If contested, the county court or a county court-appointed board of view is duty-bound to determine fair value.

LNG Stmt. 3-R at 5. *See also*

#### 6. Analysis of terms of the Joint Settlement

With certification as a public utility comes a host of responsibilities and rights. Utilities must pay assessments consistent with 66 Pa.C.S.A. § 510, they must file tariffs and meet reporting requirements. They are subject to the complaint procedures before the Commission, and they must meet the safety requirements which are applicable. In addition, a public utility has the right to exercise eminent domain consistent with the Business Corporation Law.

To exercises the power of eminent domain, the government must prove that the four elements set forth in the Fifth Amendment (to the United States Constitution) are preset: (1) private property (2) must be taken (3) for public use (4) and with just compensation.

Wert Exhibit 1 at 4.

The Applicant states:

Eminent domain is a tool to be utilized when there is no reasonable alternative available to site the required infrastructure. Otherwise, this natural gas resource which many have acknowledged as important to Pennsylvania's energy and economic interests may not come to fruition. There is a need to get the natural gas from the well to the market and absent eminent domain that may not happen. Also, many landowners will be deprived of royalties from wells on their property absent the ability to move it to market.

LNG Stmt. 3-R at 4.

It is difficult to understand how this Company's actions are important to Pennsylvania's energy interests when the Applicant admits that its intent is to move the raw gas to New York. While there "is a need to get the natural gas from well to the market," it is a need *for the business entities involved*, not for the property owners over whose land the pipes will travel with or without their consent, and certainly not for the citizens of Pennsylvania who may never use that gas. Owners of the land where the wells are drilled will only be "deprived of royalties" until the gathering companies bargain successfully for passage across the land of property owners who consent to it.

Unlike areas like the Grand Canyon, with limited ingress and egress, the Marcellus Shale is a huge area, with many, many access points. If the gathering company cannot convince one or even a group of property owners that they should lease their land for pipes, there will be another way to transport the gas. Even if there is no way to access a particular well, there will be opportunities for other wells elsewhere. The rights of the property owners with wells on their land *are not greater* than the rights of the property owners who choose not to lease their land. Therefore, "depriving them of royalties" is no argument at all. And, development of the Marcellus Shale is proceeding apace, without the ability to exercise eminent domain. The warnings of the gathering companies that landowner reluctance to grant easements and that this somehow justifies the use of eminent domain, is without support in the record.

In addition, note that non-unanimous Joint Petition ¶6d sets forth a procedure which purports to utilize the Commission's Mediation Unit and imposes restrictions and time limits on the process – all written and agreed to without checking with the Commission's Mediation Unit before including the term. The parties were warned at the evidentiary hearing to check with Mediator Herb Nurick before submitting the Joint Petition with this paragraph, but there is no indication that they did so. Therefore, there is no reason to believe that the terms of this paragraph can be implemented. Further, the fictional process produces a *non-binding* result. Therefore, while this paragraph purports to offer landowners some method for dispute resolution, the paragraph is actually meaningless.

From a factual point of view, there are marked differences between the negotiated lease of a right-of-way and an easement taken by eminent domain. Without eminent domain, the landowner can:

- ask for an exclusive easement, which restricts the gas company's right to allow other uses;
- limit the length of time of the lease, and renegotiate when the time has run;
- require the company to put the topsoil back on top after burying the pipe, to better support farming or regrowth of any kind;
- specify products which are permitted for use on the right-of-way and which are forbidden for plant control.
- require building the pipeline to specifications when building on the edge of a hill can result in a swale at the bottom;
- negotiate natural gas service directly from the pipeline;
- negotiate the right to audit the calculations which lead to the payment of royalties;
- require notification if the company ownership changes;
- include attorneys fees in the lease;

- require a leasing company to remove pipes after they are no longer being used. This can be included in a required insurance policy with indemnification and survivability clauses;
- include in the lease terms to address soil testing, spill response plans, storm water run-off plans and construction, as well as environmental restoration;
- require no arbitration clauses, venue clauses to require that any dispute be settled locally and not in federal district court;
- negotiate the price of the lease and determine whether or not the highest price offered is sufficient to compensate for the inconvenience and loss of use or damage to the environment caused by the pipeline. And then, *the landowner can say no*. See testimony of Christopher Denton, Esq., Tr. 312-329.

In other words, a landowner can exercise *control* over his or her property, where the landowner has the ability to say no.

A stark example in the differences in points of view of the property owners and the gas companies seeking rights over the lands of others, here is the answer of Rory Miller, Vice President of Onshore Gathering and Processing for The Williams Companies, Midstream, parent company to LMM:

Q: Do you know why Laser, a provider of natural gas gathering service, is seeking to be regulated as a “public utility” in Pennsylvania?”

A: No, I do not know for certain why Laser seeks to be regulated as a public utility. One possible reason that a natural gas gatherer such as Laser might request public utility status is to become eligible to exercise eminent domain authority. This would be an understandable reaction to behavior of Pennsylvania landowners that in my experience is unique to this Commonwealth. Williams, and I believe other natural gas gatherers, have encountered landowners in Pennsylvania working to an unprecedented degree to compel exorbitant compensation from natural gas gatherers for rights of way. These efforts include, among other things, corporations and coalitions of landowners which hold large amounts of surface rights blocking rights of way in order to extract excessive compensation from gatherers, as well

as right of way contracts with exclusivity provisions prohibiting contracts with any other gatherers. Williams has not encountered this behavior to such a degree in any other state. This behavior is severely damaging to the development of the Marcellus Shale and could potentially have an adverse affect [sic] on the price of natural gas.

Given that this problem is unique to Pennsylvania, LLM would not be opposed to the creation of a special gathering public utility status. Such an entity would not be subject to economic or rate regulation, but would provide an avenue for overcoming the blocking tactics that gatherers are facing when acquiring rights-of-way in the state. Instead, it would be subject only to light-handed complaint-based regulation. In the alternative, the Commonwealth might create a narrowly defined public utility status that a gathering company can voluntarily choose to seek, but which is not automatically applied to all gathering companies.

LMM Stmt. 1 at 14-15.

In other words, Pennsylvania landowners are exercising their rights as landowners and negotiating the terms to which they believe they are entitled for the long-term protection of their homes and properties. The “playing field” is fair, and LLM is disgruntled by that fact. Again, the Marcellus Shale is a huge area. If no rights are granted in one particular area, there are plenty of other properties available. While this may be inconvenient for the gas companies, there is no legal requirement that the extraction and transportation of gas be convenient. The LMM recommendation would subrogate the rights of landowners to the *convenience, not need, of the gathering companies*, not the public. While there may eventually be a special gathering utility status, should the Legislature pass the appropriate statutory basis for it, there has been no necessity shown for including the power of eminent domain in that “special” status, and without specific, exclusive territories, and siting oversight, the potential for chaos would be enormous (e.g., multiple companies crossing the same property). Again, eminent domain has not been shown to be necessary to ensure the development of the area and the safety of the pipelines.

Consider the following summary of the testimony of a local Susquehanna County attorney who has handled cases involving gas leases as well as eminent domain cases:

Where eminent domain is exercised, the negotiating ability of the landowner is removed completely. The company has the right to condemn property and offer “just compensation.” The formula for just compensation will be based on per acre valuation based on what acreage goes for in the County. It is a one-time payment, not an annual fee which would provide continuing income for the landowner.

Under eminent domain, if a landowner does not like the just compensation which the company has offered, the landowner has the burden of filing and asking for a board of view. The landowner will have to present expert testimony at that board of view to establish that the just compensation is not actually just compensation. The compensation which the company has offered does not take into consideration severance damages.

Property value is decreased if a pipeline is run down its middle. If the company pays only for that acreage where they put the pipeline, there is severance damage which is difficult to prove. Landowners will have the responsibility to identify an expert, hire the expert, pay the expert, and spend time before the board of view. The board of view may or may not agree with the landowner, and the gas company can take an appeal. That appeal goes to the Common Pleas courts where the pipeline company can get a jury trial. Continued litigation is expensive, and many landowners do not have the wherewithal to continue the fight.

In addition many landowners have negotiated with the gas companies for non surface access leases. These were carefully drafted and precluded pipelines on their property. If pipeline companies can hide behind the subterfuge of being a separate corporation and therefore, not be bound by the lease, they can use eminent domain power to override what has carefully been negotiated. *See* testimony of Richard Jordan, Esq., Tr. 263-267.

While negotiating for leases is inconvenient for gathering companies, losing one’s real property to eminent domain is even more inconvenient for landowners.

The Joint Petition for Non-Unanimous Settlement reads as if the Commission has the authority to limit or regulate the way a utility exercises its right of eminent domain. In fact,

that is misleading. The Commission has the ability to deny the certificate of public convenience, but if the Commission grants the CPC, then the utility's exercise of eminent domain is governed by the Business Corporation Law, which is not enforced by the Commission at all.

OTS avers that the Commission's broad statutory power to ensure just and reasonable service enables it to "take action under Section 1501 if excessive eminent domain actions by a certificated public utility presented a service issue adversely affecting the public interest. Such action is appropriate as the courts consider only the scope and validity of each individual eminent domain action rather than the concomitant effect of multiple actions upon the public at large." OTS RB at 20. Such a statement is overly broad and not supported by case law, regulation or statute. Commission authority is limited to that which is expressly set forth in the statute, and unlike electric transmission line and facility siting, nowhere does the Code give the Commission the ability to "take action" according to the Business Corporation Law.

In other words, after the grant of the right of eminent domain, a gathering company does not need to return to the commission for further permission.

The provisions of the non-unanimous Settlement, Paragraphs 8-32, are, by and large, those provisions which property owners can bargain for if there is no right of eminent domain. They amount to a comforting assurance that the Applicant means to carry out its business in Pennsylvania in an honorable fashion. The intent is a good one:

The Proposed Settlement provision limiting exercise of eminent domain power except as a last resort offers protection against abuse of that power, and the non-waivable Proposed Settlement provisions addressing health, safety, and the environment, which apply even when property is acquired through eminent domain, ensure that health, safety, and the environment will be factored into any decision allowing Laser to use the eminent domain process.

Scroggins MB at 9 (citations omitted).

However, as the discussion regarding conditions shows, the inclusion of conditions which fall outside the purview of the Commission are not enforceable. A number of

them fall squarely within the jurisdiction of other agencies, and no amount of “public interest” will give the PUC the ability to enforce them.

MarkWest expresses the following opinion:

. . . I believe that Commission regulation of these entities, beyond enforcing the federal safety standards found in 49 C.F.R. § 192, will hinder the development of the Marcellus Shale play, to the detriment of Pennsylvania’s natural gas and electric customers, as well as Pennsylvania’s economy. The business of gathering gas is complex and driven by competition. A gatherer’s operations will differ greatly, depending on the individual business structure of an entity and the contracts that the entity enters into with its customers. Operators need the flexibility to enter into unique contracts that meet the needs of their clients. This model does not fit typical utility regulation, as least as it is currently defined in Pennsylvania statutes or Commission regulations. A regulated utility may only offer specific services at a predetermined rate. Producers with the decision of whether to move their gas stream with a utility or a non-utility will likely choose the non-utility, with which the producer can negotiate better terms and fees. Furthermore, if the Commission were to award certain gathering operators specific service territories, the ability for market competition would be eliminated, granting one operator the ability to demand charges of producers within that area, regardless of whether the terms, conditions or fees offered were reasonable. This could stifle market competition and prevent Pennsylvania from enjoying the benefits of the abundant natural gas supply within its boundaries. Therefore, the gathering business must continue to preserve market competition, by allowing producers and gatherers the flexibility to negotiate the terms of service necessary to transport and process the gas.

MarkWest Stmt. 1 at 16.

7. Lack of definitions

Terms which could be interpreted in more than one way include:

Reasonably or reasonable. ¶3, ¶6a. The pipeline will be “reasonably marked” and the Company will tell the Commission what that means. This leaves the Commission no ability to approve or

disapprove and might as well read: The Company will do as it pleases, but we'll tell you about it. In addition, eminent domain will be used when "all other reasonable options" are not available. This requires a determination of what reasonable options have been exhausted and whether they have been exhausted. The terminology is too vague to be useful.

Proven high quality. ¶4. This paragraph, regarding the quality of materials used to build the pipeline, leaves no room for enforcement.

Appropriate. ¶5c. The Company does not plan to install compressors, but the testimony of industry expert Anthony R. Ingraffea makes it clear that such installation is all but inevitable because of the pressure needs of a continuing transmission of gas over time. Silver Lake Stmt. 1 at 9; Silver Lake Stmt. 2-R at 5.

Last resort ¶6; Good faith. ¶6a; Prompt ¶6d; Impasse. ¶6d; Timely. ¶6d. Without a definition, these are not standards which have any meaning.

The terms used in the non-unanimous Settlement are too vague to be enforceable.

#### 8. Light-handed regulation

“Moreover, contrary to suggestion in this matter, there is no legal authority to forbear from applying requirements of the Code and substitute “light-handed regulation” without going through the appropriate legislative process. It should be noted that while MarkWest is opposed to the regulation of financial matters of gathering lines, MarkWest and other members of the natural gas industry are currently working to pass legislation that will clearly establish the Commission’s authority to require, audit and enforce the requirements found in 49 C.F.R. §192 as a certified agent of the U.S. Department of Transportation Pipeline and Hazardous Materials Safety Administration (“PHMSA”), regardless of the utility status of a pipeline. It is also important to note that all gathering lines are subject to the regulatory oversight of an agency that monitors safety – the only question is whether that is a federal

or state level agency. Further, MarkWest supports any requirement that all gathering pipelines participate in the Pennsylvania One-Call Program.”

MarkWest MB at 3-4.

Likewise, “LMM strongly supports the Commission having such authority [to regulate pipeline safety], and is actively involved with other industry members and the Commission to obtain the necessary legislation.” LMM RB at 8. This includes the possibility that the legislature could create a special gathering public utility status which “would not be subject to economic or rate regulation, but would provide an avenue for overcoming the blocking tactics that gatherers are facing when acquiring rights-of-way in the state. Instead, it would be subject only to light-handed complaint-based regulation.” LMM MB at 22. Either way, the regulatory treatment of gatherers should be developed on a statewide basis and not piecemeal in proceedings involving applications for CPCs. LMM MB at 22.

Laser’s definition of “light-handed regulation” is evident from the non-unanimous Settlement: 1) negotiated rates like natural gas transportation with maximum rate or LDC gas alternate/competitive energy tariffs (*see e.g.*, Columbia Gas of Pennsylvania, Inc. negotiated contract rates for customers under Tariff No. 144 to Tariff Gas-Pa. PUC No. 9 Fifth Revised pages 115 and 116); (2) no proceedings for commencement, transfer or abandonment; safety regulation applies including any new amendments to the Statute or any new law; complaint forum remains effective; and (4) streamlined annual reporting to be developed. ¶ 36.

There is no legal support for a finding that Applicant should or could be excused from the responsibilities of a CPC when it is taking advantage of the benefits. “Light-handed regulation,” similar to that applied to natural gas suppliers (NGSs) and electric generation suppliers (EGSs), must be established by legislation. Unlike the NGSs and EGSs, a natural gas gathering company subject to Commission supervision would entail inspection of many miles of pipelines, which will incur substantial cost to the Commission and should be subject to assessment to cover those costs.

The fact that the equipment used is potentially quite dangerous is not a factor in determining whether the service offered is “to or for the public.” In fact, “The equipment possesses no mystical qualities or characteristics which render the service for which it is utilized a public service irrespective of the private or public nature of the services or the definite (tenants) or indefinite (public) identification of the persons served.” *Drexelbrook* at 439, citing the lower court opinion, 206 Pa. Superior Ct. At 136, 212 A.2d at 234.

9. Recommendation

Regional gathering companies like Laser affect the public interest in a way that requires regulation. “The phrase ‘affected with a public interest’ can, in the nature of things, mean no more than that an industry, for adequate reasons, is subject to control for the public good.” *Nebbia v. New York*, 291 U.S. 502, 515-516 (1934). Indeed, it is already recognized that the service of gas transportation and its attendant facilities affect an array of public interests. *See* 15 U.S.C. § 717(a) (2006) (declaring that “the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest”).

Scroggins RB at 14.

But the fact that an industry “requires regulation” does not mean that the Commission has the authority to impose it. The Commission’s jurisdiction is statutory and cannot be extended to those activities which are not covered by the Public Utility Code.

It is clear that the Commissioners themselves are interested in supervising the safety of the gathering lines which do not fall under federal jurisdiction, as evidenced by the quotes appearing in party briefs from the Commission’s en banc proceeding, and in fact, the companies participating in this proceeding do not object to safety supervision from the Commission. The local populace understands the situation and simply asks that the Commission obey the existing law and the Legislature oversee the safety issues:

Everybody understands the gas has to get to market. Going to be more and more gas wells present in the county on adjoining land and on each individual landowners' land, the gas has to get to market. We know that can't be stopped.

The people signed gas leases, signed the gas leases to participate. And because of that participation and signing the gas leases, it is best left for the landowner and the gas company to negotiate how their land is going to be affected.”

Testimony of Mike Giangrieco, Susquehanna County  
Commissioner, Tr. 73.

The Laser Marcellus Pipeline is for wholesale distribution of gas. The PUC's mission statement focuses on consumers and the public interest. Its mandate does not include helping extractors of natural resources get their product to market. This Application tries to gloss over this huge contradiction by stating that it will offer, render, furnish or supply natural gas gathering, transporting or conveying service by pipeline to the public in named townships, but it will actually be transporting gas from the public. . . . Natural gas pipelines of any size are dangerous. And wherever they are installed, they must be carefully regulated. But that cannot involve turning the definition of a public utility on its head, violating the mandate and mission of the PUC and setting a risky precedent.

Testimony of Hillary Caws Elwitt, Tr. 116-117.

The development of the Marcellus Shale gas resource is a massive new venture that is growing faster than the development of a proper regulatory environment.

Granting the right of eminent domain would further compound and threaten the public safety and the potential for serious environmental degradation resulting from inadequate regulation, especially if the application includes not only central gathering pipeline but the lateral or feeder pipes from well pads which will remain. . . .

Pipelines are a necessary part of the development of the Marcellus Shale. However, a grant of authority from the PUC for a pipeline company . . . is not necessary. Other gas gathering lines are being successfully developed without a grant of eminent domain to the developer. Landowners are being properly

compensated, their wishes are being heard and gas is being delivered to interstate pipelines.

Testimony of Keith Oberg, Tr. 221-222.

The South Branch Tunkhannock Creek Watershed Coalition, a group of citizens advocating the protection of the waters of the south branch watershed, requests that you deny the application of Laser Marcellus Gathering LLC for a certificate of public convenience. We strongly feel that the PUC be given regulatory authority to address all collection and gathering gas pipelines within Pennsylvania. This regulatory authority should be done without requiring all pipeline facilities to meet its definition of a public utility.

Testimony of Ellie Hyde, Tr. 259-260.

While [The Countryside Conservancy] recognizes the importance of regulating pipelines crisscrossing the Commonwealth, it does not believe that granting public utility status to a midstream pipeline operator is the appropriate means for achieving this goal. Regulation should be a priority but it should not be the ground for the PUC to grant public utility status.

Testimony of Mary Felley, Tr. 262-263.

This is not the same as power transmission lines or the extension of an existing highway or the addition of interstate pipeline. The impact of granting this new class of activity of a certificate of public convenience is exponentially greater.

There are literally tens of thousands of wells forecast for development throughout PA and well spacing is often less than half mile. All wells would go interconnected with gathering lines.

Imagining this on a grid, one can see that a very high percentage of landowners in any gas development area have the potential of being impacted by gathering pipeline right-of-ways.

Testimony of George Turner, licensed geologist, Tr. 272.

Issuing a CPC to this Applicant would necessarily mean that the Commission has determined that the actions described in the Application merit and therefore, *require*, that entities

performing similar functions also be certificated.<sup>5</sup> While there is insufficient statutory basis for exercising jurisdiction over the Applicant presently, the Commission may seek to obtain statutory authority for safety based jurisdiction in the future. The testimony of Michael Gruber, OTS,<sup>6</sup> provides a set of guidelines for this endeavor:

In paragraph 9 on pages 4 and 5 of the Company's Application, the Company has agreed to a specific way of doing business. This paragraph notes that the Company intends "to minimize impact to wetlands, the avoidance of state and local parks, population density with a bias towards less populated areas, constructability and terrain. (Application, p. 4) Further the Company states that local landowner concerns including a bias toward property lines and feedback obtained at a public meeting will be used to determine the siting of the pipeline. The Company is also reaffirming its position to negotiate right of way easements based upon fair market land valuation.

Q: What comments do you have on the how [sic] the Company plans to conduct business?

A: It is my opinion that each of the items mentioned above are necessary items which must be agreed to by this Company and any other companies who wish to conduct a natural gas gathering business in Pennsylvania. Further, the Company's agreement to follow the above principles limits the need for the Company to use eminent domain. Therefore, if the Commission agrees not to exercise full authority over siting, it should also limit Laser Northeast's and other gathering companies' ability to make use of eminent domain for the acquisition of land and/or rights of way.

Q: Do you have any comments regarding the method of regulation in the Company's Application?

A: Yes. The Company's proposal is generally acceptable to the Office of Trail Staff. However, there are three issues that the Commission should address:

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<sup>5</sup> While the Applicant states that it does not claim that all gathering companies provide public utility service, the fact of the matter is that a finding that this Applicant is providing public utility service would translate into a requirement that similarly situated gathering companies also be certificated. The statute requires that an entity providing public utility service be certificated prior to offering such service. 66 Pa.C.S.A. §1101.

<sup>6</sup> Approval of the Joint Petition for Non-Unanimous Settlement negates the recommendations in the OTS testimony. The Joint Petition is not approved here.

1) The Commission should make it clear that Laser Northeast and any other companies who eventually provide gathering and transportation service will be required to pay a utility assessment to compensate the Commission for required measures it must undertake as part of its regulatory function.

2) The Commission should promulgate regulations concerning the operational safety of natural gas gathering and transportation pipelines, and

3) The Commission should make it clear that while this Company and any other companies who eventually provide gathering and transportation service will have the power of eminent domain, the exercise of such power will be regulated closely in order to ensure that the Company first participates in good faith negotiations with affected landowners.

OTS Stmt. 1 at 4-5.

OTS has supplied copies of regulations from other states as examples, attached to its testimony. I note that these regulations would be appropriate if a gathering company is granted the power of eminent domain but that *there is no factual justification for the grant of this power to gathering companies*. The service offered is simply not “to or for the public,” and the transactions are more fairly negotiated between landowners and companies on a level playing field. The overriding concern is for public safety, and safety oversight can be granted in legislation without giving the companies the power of eminent domain.

The Applicant states:

We discuss this issue in our joint rebuttal testimony (LNGC Stmt. No. 2-R) and state that since the Commission does not engage in siting for the intrastate gas lines of local distribution companies, buried electric and telephone lines or water or sewer utility lines, there would be no requirement for the Commission’s siting of natural gas gathering pipelines. None of the intrastate gas pipelines operated in Pennsylvania have been cited by the Commission. In Laser Northeast’s view, there is no existing need for the Commission to now issue siting regulations for natural gas gathering pipelines.

LNGC Stmt. 5-R at 4.

Local gas distribution companies have exclusive territories which require them to site their facilities in a sensible fashion to best serve those customers desiring their service. This means that typically, there will be one company's gas line running up the road in a development, not multiple pipelines from more than one company with eminent domain crossing the fields of the farm located between the wells and the transmission line. It also means that the citizens whose land has the pipes running through them can arrange for service from those pipes. A gathering system is not analogous to a local distribution company. Eminent domain is not an appropriate tool for a gathering company to have when those citizens burdened by the pipeline do not benefit from it.

The Joint Settlement does provide a solid basis for development of regulations, should the Legislature see fit to provide the necessary statutory basis for Commission jurisdiction over gathering companies. Additional regulation concerning the nature of the contact made to property owners would be appropriate as well, to eliminate the type of threats and coercion reported by a number of individuals (*see* testimony of John Trallo, Tr. 137; Michael Kaschak, Tr. 175, and content of e-mail attached to Protest of Laurie and Brian Kaszuba, subsequently withdrawn, reproduced in Wert Exhibit 1 at 6, for examples of inappropriate behavior towards landowners). The Commonwealth would be a safer place if all of the gathering companies would abide by the standards set out in the Joint Settlement, and the Applicant is commended for committing to this high standard of behavior.

In conclusion, the Application for a certificate of public convenience should be denied because the actions described for which authority is sought do not meet the definition of "public utility" within the meaning of the Public Utility Code. A non-unanimous Joint Petition for Settlement does not confer jurisdiction upon the Commission where none exists otherwise. While it is clear that there should be some oversight of the safety aspects of gathering companies, legislation is needed to confer it upon the Commission.

## VI. CONCLUSIONS OF LAW

1. The Commission has jurisdiction to determine its own jurisdiction.
2. The proponent of a rule or order in any Commission proceeding has the burden of proof, 66 Pa.C.S.A. § 332, and therefore, the Applicant has the burden of proving its entitlement to certification and must do so by a preponderance of the evidence, or evidence which is more convincing than the evidence presented by the other parties. *Se-Ling Hosiery v. Margulies*, 364 Pa. 45, 70 A.3d 854 (1950); *Samuel J. Lansberry, Inc. v. Pa. Publ. Util. Comm'n*, 578 A.2d 600 (Pa. Cmwlth. 1990).
3. Any finding of fact necessary to support an adjudication of the Commission must be based upon substantial evidence, which is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Mill v. Comm., Pa. Publ. Util. Comm'n*, 447 A.2d 1100 (Pa. Cmwlth. 1982); *Edan Transportation Corp. v. Pa. Publ. Util. Comm'n*, 623 A.2d 6 (Pa. Cmwlth. Ct.1993), 2 Pa.C.S. § 704. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. V. Pa. Publ. Util. Comm'n*, 489 Pa. 109, 413 A.2d 1037 (1980); *Erie Resistor Corp. v. Unemployment Com. Bd. Of Review*, 166 A.2d 96 (Pa. Super. 1960); *Murphy v. Comm., Dept. of Public Welfare, White Haven Center*, 480 A.2d 382 (Pa. Cmwlth. 1984).
4. Before rendering public utility service, an entity is required to obtain a certificate of public convenience. 66 Pa.C.S.A. § 1101.
5. A certificate of public convenience will be issued “only if the Commission shall find or determine that the granting of such certificate is necessary or proper for the service, accommodation, convenience, or safety of the public. . . .” 66 Pa.C.S.A. § 1103(a).
6. An applicant must meet the definition for “public utility” under the Public Utility Code, 66 Pa.C.S.A. § 102.

7. Applicant bears the burden of proving that its actions fall within the definition of the term “public utility” as it appears in the Public Utility Code, and, if so, that it is technically and financially fit to be certificated.

8. The seminal case for evaluating whether an entity is a public utility within the meaning of the Public Utility Code is *Drexelbrook Associates v. Pa. Publ. Util. Comm’n*, 418 Pa. 430, 212 A.2d 237 (1965).

9. The public or private character of the enterprise does not depend upon the number of persons by whom it is used, but upon whether or not it is open to the use and service of all members of the public who may require it. *Drexelbrook* at 435, citing *Borough of Ambridge v. P.S.C.*, 108 Pa. Super. 298, 304, 165 At. 47, 49 (1933).

10. “[A] public use . . . is not confined to privileged individuals, but is open to the indefinite public” and “it is this indefinite or unrestricted quality that gives it its public character.” *Drexelbrook* at 436, citing *Camp Wohelo, Inc. v. Novitiate of St. Isaac Jogues*, 36 Pa. P.U.C. 377 (1958).

11. The Commonwealth Court reads *Drexelbrook* as the Supreme Court’s determination of whether utility service is being offered “for the public” as “whether or not such person hold himself out, expressly or impliedly, as engaged in the business of supplying his product or service to the public, as a class, or *to any limited portion of it*, as contradistinguished from holding himself out as serving or ready to serve only particular individuals.” *Waltman v. Pa. Publ. Util. Comm’n*, 596 A.2d 1221, 1223 (Pa. Cmwlth. 1990), citing *Drexelbrook* at 418 Pa. 435-436, 212 A.2d at 239.

12. The private or public character of a business does not depend upon the number of persons who actually use the service; rather, the proper characterization rests upon whether or not the service is available to all members of the public who may require the service. *C.E. Dunmire Gas Co., Inc. v. Pennsylvania Public Utility Commission*, 50 Pa. Cmwlth. 600, 413 A.2d 473 (1980). The fact that only a limited number of persons may have occasion to use a

utility's service does not make it a private undertaking if the general public has a right to subscribe to such a service. Masgai V. Pennsylvania Public Service Commission, 124 Pa. Superior 370, 188 A. 599 (1936); Borough of Ambridge, supra.; Waltman at 50.

13. The Supreme Court of Pennsylvania clarified that a single customer is not "the public," in its decision in *Bethlehem Steel Corporation v. Pa. Publ. Util. Comm'n*, 552 Pa. 134, 713 A.2d 1110 (1998), unless the reason for the single customer was the entity's inability to secure other customers despite actively seeking additional customers to no avail. *See also Pilot Travel Centers LLC v. Pa. Publ. Util. Comm'n*, 933 A.2d 123 (Pa. Cmwlth. 2007).

14. Commission guidelines for determining public utility status mirrors the standard in *Drexelbrook*. 52 Pa.Code § 69.1401.

15. A non-unanimous settlement does not change the burden of proof nor the standard of legal review.

16. The Applicant does not satisfy the definition of public utility within the meaning of the Public Utility Code. 66 Pa.C.S.A. § 102.

17. The service proposed by Applicant is not "to or for the public" within the meaning of the Public Utility Code. 66 Pa.C.S.A. § 102.

18. A gathering system designed to serve the producers of natural gas by transporting the gas to a designated transmission line is constructed only to serve specific individuals.

19. The non-unanimous Joint Petition for Settlement is disapproved as not consistent with the Public Utility Code, and consequently not in the public interest.

20. The Applicant has not satisfied its burden of proving entitlement to a certificate of public convenience.

VII. ORDER

THEREFORE,

IT IS RECOMMENDED:

1. That the non-unanimous Joint Petition for Settlement signed by Laser Northeast Gathering Company, LLC; Office of Trial Staff; William C. Fischer; Vera Scroggins; and Silver Lake Association, is disapproved.
2. That the Application of Laser Northeast Gathering Company, LLC, for Approval to Begin to Offer, Render, Furnish, or Supply Natural Gas Gathering and Transporting or Conveying Service by Pipeline to the Public In Certain Townships of Susquehanna County, Pennsylvania, Docket No. A-2010-2153371, is denied.
3. That the Secretary mark this docket closed.

Dated: November 22, 2010

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Susan D. Colwell  
Administrative Law Judge